IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GUILFORD COLLEGE, GUILFORD COLLEGE INTERNATIONAL CLUB, THE NEW SCHOOL, FOOTHILL-DE ANZA COMMUNITY COLLEGE DISTRICT, HAVERFORD COLLEGE, THE AMERICAN FEDERATION OF TEACHERS, JIA YE, *and* SEN LI. *Plaintiffs*, v. KIRSTJEN NIELSEN, U.S. DEPARTMENT OF HOMELAND SECURITY, L. FRANCIS CISSNA, *and* U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Defendants*.	Civil Action No. 18-cv-891 **FIRST AMENDED COMPLAINT**

FIRST AMENDED COMPLAINT

Plaintiffs Guilford College, Guilford College International Club, The New School, Foothill-De Anza Community College District, Haverford College, the American Federation of Teachers, Jia Ye, and Sen Li bring this Complaint against Defendants Kirstjen Nielsen, in her official capacity as Secretary of Homeland Security; the U.S. Department of Homeland Security ("DHS"); L. Francis Cissna, in his official capacity as Director of U.S. Citizenship and Immigration Services; and U.S. Citizenship and Immigration Services ("USCIS"). Plaintiffs allege as follows.

INTRODUCTION

1. The United States is a center of global education. Because many of the world's

leading colleges, universities, and research institutions are located here, more than a million individuals travel to the United States each year to study and teach. On August 9, 2018, Defendants adopted a new policy that is purposefully designed to impose three- and ten-year bars to reentry on tens of thousands of these individuals. This policy is a massive reconfiguration of the immigration laws relating to higher education.

2. In 1996, Congress created the concept of "unlawful presence" and established a penalty for individuals who are "unlawfully present" in the United States. An individual who is unlawfully present for more than 180 days is barred from reentering the United States for a period of three years. An individual who is unlawfully present for a year or more is barred from reentering for ten years. These reentry bars are typically not subject to any judicial review. And, because these reentry bars preclude an individual from lawfully entering the United States for any purpose for a lengthy period of time, they fundamentally disrupt the personal and professional lives of those affected, as well as the missions of affected organizations and institutions.

3. In 1997, the United States adopted a clear policy governing the calculation of unlawful presence under this statute. Recognizing that the determination of whether an individual is "unlawfully present" in the United States is complex and will often turn on administrative discretion, the United States established objective rules that provided visa holders notice. If the authorized period of stay ended on a date certain on which the individual was required to leave the country, unlawful presence began following that date. And for all individuals, unlawful presence began the day after either a government official or immigration judge made a determination that the individual was out-of-status. This provided well-intentioned individuals an opportunity to cure their circumstances and remain in the

country—or to depart the country within 180 days. Either way, individuals acting in good faith had an opportunity to avoid imposition of a three- or ten-year reentry bar.

4. The United States reaffirmed this policy for more than two decades, including via a May 2009 Policy Memorandum. *See* Ex. C.

5. The vast majority of international students[1] enter the country on F or M visas, while some enter on J visas. Many international researchers, scholars, and professors at higher education and research institutions enter the country on J visas for exchange visitors. In general, when F, J, or M visa holders enter the country, they are not supplied with a date certain on which they must depart. Rather, their visas are valid for the "duration of status," or "D/S."

6. For more than two decades, the United States has held that the unlawful-presence clock for these individuals begins on the day after a government official or immigration judge adjudicates the individual as out-of-status. That is, unlawful presence begins at the point that an F, J, or M visa holder is provided unequivocal notice that the government believes that the individual is out-of-status.

7. This policy provided essential notice to F, J, and M visa holders. Technical or inadvertent errors can render an individual unwittingly out-of-status. Moreover, whether an individual is in-status often turns on complex issues subject to varying interpretations, and those adjudications are often at the discretion of USCIS officials.

8. On August 9, 2018, Defendants issued a new policy memorandum (August 2018 Policy Memorandum, Ex. A). The August 2018 Policy Memorandum fundamentally

[1] By "international students," we refer to individuals who are neither U.S. citizens nor lawful permanent residents and who, prior to starting their education, typically resided outside the United States.

alters the calculation of unlawful presence for F, J, and M visa holders.

9. Now, when a government official or immigration judge determines that an F, J, or M visa holder is out-of-status, the unlawful-presence clock will be backdated to the day on which Defendants conclude that the visa holder first fell out-of-status. The immigration system is beset with processing delays, and many of these status determinations are made when an individual is applying for new immigration benefits. Thus, the new policy's use of a backdated unlawful-presence clock will render tens of thousands of F, J, and M visa holders subject to three- and ten-year reentry bars without any opportunity to cure.

10. This policy is intentionally designed to impose tens of thousands of reentry bars on F, J, and M visa holders each year.

11. This policy, accordingly, will result in the three- or ten-year banishment of untold numbers of international students and exchange visitors acting in good faith.

12. The imposition of a reentry bar on an international student or exchange visitor has a drastic effect on her life. It will preclude her from completing her degree program, deprive her of employment opportunities, and exclude her from friends and family living in the United States. For those students and visitors who have chosen to teach or work in the United States, imposition of a three- or ten-year reentry bar will fundamentally and irreparably injure their lives. It also imposes a financial harm on institutions in terms of lost tuition dollars and local communities in terms of foregone discretionary expenditures by visa holders.

13. This policy thus drastically injures holders of F, J, and M visas. Moreover, by disrupting the ability of these individuals to continue studying at their schools—or continuing their research, teaching, or other scholarly pursuits—the August 2018 Policy

Memorandum fundamentally upsets student-school and employee-school relationships. This results in concrete, significant harms to colleges and universities, including through the loss of irreplaceable community members, loss of tuition dollars, and loss of trained employees.

14. This new policy is unlawful for several reasons.

15. To begin with, Defendants failed to undertake the notice and comment required in these circumstances. Defendants did not publish advance notice of this rule in the *Federal Register*, did not provide reasoned responses to public comments, did not undertake the required Regulatory Flexibility Act analysis, and did not comply with the whole host of requirements imposed by the Administrative Procedure Act ("APA").

16. The policy is also arbitrary and capricious. Defendants assert that the advent of a computer database in August 2003 justifies the policy change. But Defendants had previously reaffirmed this policy many years after that computer database came online. And the policy is arbitrary and capricious for several other reasons. For example, the August 2018 Policy Memorandum relies on erroneous data and erects arbitrary distinctions among similar classes of individuals.

17. The policy violates the statutory text. In 1996, Congress created a new concept of "unlawful presence." As Defendants have said in prior memoranda, "unlawful presence" must be understood as distinct from the concepts that previously existed. Because Defendants' new policy is at odds with the statutory text, it is unlawful.

18. The policy violates protections guaranteed by the Due Process Clause. The August 2018 Policy Memorandum will result in the imposition of three- and ten-year bars on individuals without notice or the opportunity to cure. The Constitution forbids such unforeseeable and arbitrary government conduct.

19. For these reasons and others, the Court should vacate the August 2018 Policy Memorandum, declare it unlawful, and enjoin Defendants from applying it.

PARTIES

Plaintiffs

20. Plaintiffs in this case include multiple leading higher education institutions. Each school counts as students, employees, and exchange visitors a significant number of individuals who are present in the United States based on an F, J, or M visa.

21. Plaintiff **Guilford College** is a private, liberal arts college in Greensboro, North Carolina. Guilford was originally founded in 1837.

22. Guilford currently enrolls approximately 26 students on F-1 visas. Additionally, Guilford has approximately six alumni F visa holders on post-completion optional practical training.

23. Guilford is required to terminate student I-20s when students fall out-of-status. In view of the August 2018 Policy Memorandum, some I-20 terminations will result in students being saddled with a three- or ten-year reentry bar.

24. Plaintiff **Guilford College International Club** is a student association at Guilford College.

25. Guilford College International Club is an unincorporated, voluntary association, and its members include Guilford College students present in the United States on F-1 visas. It has two or more members, and they are joined together by mutual consent for a common, nonprofit purpose.

26. Guilford College International Club has regular meetings of its members.

27. Guilford College International Club counts as among its mission the advocacy

for the rights of its international student members within the United States.

28. Plaintiff **The New School** is a private research university located in New York City. The New School consists of the Parsons School of Design, the Eugene Lang College of Liberal Arts, The New School for Social Research, the Schools of Public Engagement, and the College of Performing Arts.

29. More than 10,000 students are enrolled at The New School. Over 30 percent of The New School's students are international. The New School features one of the highest—if not the highest—proportions of international students among all higher education institutions in the Nation.

30. Currently, The New School has among its community approximately 3,600 international students on F-1 visas.

31. Many of The New School's 3,600 international students have on-campus employment—and are thus employees of The New School—consistent with the terms of the F-visa regulations.

32. The New School also has roughly an additional 900 F-1 alumni currently completing optional practical training.

33. The New School has approximately 100 students on J visas and roughly an additional 38 J-1 scholars.

34. Each year, The New School is obligated to terminate dozens of I-20s because of identified status violations.

35. In some (if not many) of these cases, the August 2018 Policy Memorandum will result in the imposition of a three- or ten-year reentry bar.

36. Recently, because of the August 2018 Policy Memorandum, a student of The

New School left the United States in order to take the correct action to regain her status but subsequently took a semester-long leave of absence out of fear of accruing unlawful-presence time under the new policy. That fundamentally disrupted the student-university relationship, and The New School lost tuition as a result. But for the August 2018 Policy Memorandum, the student would not have stopped her education with The New School.

37. Another student at The New School, a doctoral candidate, had an I-20 with a program end date of June 30, 2018. This student has been at The New School since 2012. Because of financial constraints, the student was unable to extend the I-20, as the Designated School Officer was unable to determine that the student could support themselves. To avoid accruing unlawful presence under the August 2018 Policy Memorandum, the student was required to travel in order to restart the I-20, which came at significant cost.

38. The August 2018 Policy Memorandum has caused The New School to change its policies and practices regarding international students. For example, the new policy has caused The New School to defer advising with respect to students' change-of-status and reinstatement applications. The institution is more likely to refer a student to an outside immigration lawyer. That increases the costs to the students and imposes delay burdens on The New School.

39. Plaintiff **Foothill-De Anza Community College District** is a public district of community colleges located in Cupertino, California. The district operates Foothill College and De Anza College.

40. Currently, the Foothill-De Anza Community College District has more than 2,500 international students on F-1 visas.

41. Each year, the Foothill-De Anza Community College District is required to

terminate I-20s when it identifies that students are out-of-status. Under the August 2018 Policy Memorandum, many students identified as out-of-status will be subject to a three- or ten-year reentry bar. That is because, when Foothill-De Anza Community College District identifies a status violation, sometimes more than 180 days will have elapsed from the underlying facts giving rise to that violation.

42. Plaintiff **Haverford College** is a private, liberal arts college located in Haverford, Pennsylvania. Haverford was founded in 1833. More than 1,300 students are enrolled at Haverford.

43. Haverford counts among its community approximately 148 students on F-1 visas. Haverford also has one student on a J visa.

44. In addition, Haverford has approximately 17 alumni on F visas who are still in the United States during a period of optional practical training.

45. In response to the August 2018 Policy Memorandum, Haverford has changed its practices regarding international students. It now makes different advising decisions. For example, prior to the August 2018 Policy Memorandum, Haverford would provide its students a range of advice regarding compliance with visa status. Following that memorandum, Haverford more frequently advises its students to consult with outside immigration lawyers, which imposes added burden and delay on students and Haverford alike.

46. In particular, as a result of the August 2018 Policy Memorandum, Haverford recently was required to ask two international students to leave the campus based on potential status violations that, prior to the new policy, would not have disrupted their studies. This upset the crucial student-university relationship with these students and has

irreparably disrupted these students' educational plans, and Haverford has lost tuition as a result.

47. Plaintiff the **American Federation of Teachers** ("AFT") is an affiliate of the AFL-CIO. AFT was founded in 1916, and today represents approximately 1.7 million members who are employed across the nation in K-12 and higher education, public employment, and healthcare. The AFT has a longstanding history of supporting and advocating for the civil rights of its members and the communities they serve.

48. The AFT has approximately 230,000 members employed by higher education institutions throughout the country. This membership includes graduate students that are on F visas and are engaged in on-campus employment as teaching assistants. This membership also includes members on J visas who are part of an exchange visitor program.

49. Additionally, the AFT has more than one million members throughout the country employed in K-12 schools. This membership includes teachers present in the United States on J visas who are teaching in K-12 schools as part of an exchange visitor program.

50. Members of the AFT also teach students who are present in the United States on F and J visas. These students are integral members of their educational institutions. They contribute to the diversity of experience and viewpoint in classrooms, engage in valuable research projects, and play leadership roles in student life.

51. Plaintiff **Jia Ye** is an individual residing in the State of Texas.

52. Ye entered the United States in 2013 via an F-1 visa.

53. Ye studied health education at Texas A&M University. He graduated in 2015 with a Master of Science degree.

54. Ye was awarded a teaching assistant position during his studies as a masters

degree candidate at Texas A&M University. That position supported his tuition.

55. Ye was recruited by and enlisted with the U.S. Army via a program called "Military Accessions Vital to National Interest" or MAVNI. This program, first created under President George W. Bush, provided an opportunity for legal non-citizens who are licensed health care professionals or possess critical foreign language skills to enlist in the United States military. In most cases, at the end of Basic Combat Training, participants in MAVNI receive U.S. citizenship. Since the initiation of the MAVNI program in 2009, more than 10,000 soldiers, sailors and airmen have served with honor and distinction under it.

56. On November 24, 2015, Ye signed an Army enlistment contract for entry in the Delayed Entry Program. He agreed to serve eight years, beginning with four years of active duty. Like other MAVNI recruits, Ye was told that he would be shipped to Basic Combat Training within approximately six months after enlistment. In the meantime, the Army encouraged him to attend weekly meetings to familiarize himself with military protocol and technology and to stay "Army ready."

57. The U.S. government has not, however, provided Ye a report date for basic training. The government asserts that it continues to process his security clearance, more than three years after he initially enlisted.

58. Following graduation from Texas A&M University, Ye worked under a program known as Optional Practical Training. Optional Practical Training is a period during which undergraduate and graduate students with F-1 status who have completed or have been pursuing their degrees for more than three months are permitted by USCIS to work for one year on a student visa towards getting practical training to complement their education. After his Optional Practical Training expired, Ye attended classes at the Houston

Community College, but financial constraints required him to cease taking classes in Spring of 2018.

59. While Ye waits for his order to report to basic training, he remains in the United States on his F visa. USCIS, in a stakeholder call held in August 2018, stated that MAVNIs like Ye are now deemed to be accruing unlawful presence.

60. Plaintiff **Sen Li** is an individual residing in the State of New York.

61. Li entered the United States via an F-1 visa in August 2013. He enrolled in a biomedical engineering masters program at the State University of New York, Binghamton. He later transferred to OPMI Business School, where he continued his studies in English as a Second Language.

62. On January 14, 2016, after having been recruited by the Army, Li entered the MAVNI program by signing an Army contract for entry in the Delayed Entry Program at the Harlem, New York, recruiting station. Li agreed to serve eight years, with four years of active duty. Like other MAVNI recruits, Li was told that he would be shipped to Basic Combat Training within approximately six months after enlistment. In the meantime, the Army encouraged him to attend weekly meetings to familiarize himself with military protocol and technology and to stay "Army ready."

63. Because of the government's delays in processing individuals for the MAVNI program—including via its decision to substantially slow the security background process—Li has not yet been scheduled for basic training.

64. Li received his diploma from OPMI on August 24, 2018; he has not attended school since that date. He is thus presently waiting for an order to report to basic training.

Defendants

65. Defendant Kirstjen Nielsen is the Secretary of Homeland Security and therefore the "head" of the Department of Homeland Security. 6 U.S.C. § 112(a)(2). Under the Immigration and Nationality Act, she is charged with administering and enforcing the federal immigration and nationality laws. 8 U.S.C. § 1103(a)(1), (3). She is sued in her official capacity.

66. Defendant Department of Homeland Security ("DHS") is the executive department charged with authority over federal immigration law (*see* 6 U.S.C. § 251) and an "agency" within the meaning of the APA (5 U.S.C. § 551(1)).

67. Defendant L. Francis Cissna is the Director of U.S. Citizenship and Immigration Services and therefore the "head" of that agency (6 U.S.C. § 271(a)(2)). He is sued in his official capacity.

68. Defendant U.S. Citizenship and Immigration Services ("USCIS") is a component of DHS (6 U.S.C. § 271) and an "agency" within the meaning of the APA (5 U.S.C. § 551(1)). USCIS is the component of DHS that issued the August 2018 Policy Memorandum.

JURISDICTION AND VENUE

69. This Court has federal question jurisdiction over Plaintiffs' complaint under 28 U.S.C. § 1331. It has the authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201, 2202; 5 U.S.C. §§ 705, 706(1), 706(2)(A)-(D); and its general equitable powers.

70. The APA provides a cause of action for parties adversely affected by final agency action when "there is no other adequate remedy in a court." 5 U.S.C. § 704. That

condition is met in this case because the August 2018 Policy Memorandum is a "final agency action" within the meaning of the statute and there is no other adequate remedy available in any other court.

71. Venue is proper in this district under 28 U.S.C. § 1391(e)(1) because Defendants are officers or agencies of the United States and one or more Plaintiffs reside in the district within the meaning of 28 U.S.C. § 1391(d).

FACTUAL BACKGROUND

Immigration for Higher Education and Research Institutions Provides Innumerable Benefits to the United States

72. Many of the world's leading higher education and research institutions are located in the United States. More than a million individuals travel to the United States each year to study, research, or teach on F, J, or M visas.

73. Most international visitors require a visa to be admitted to the United States. Nearly all international students who travel to the United States from abroad are admitted via an F, J, or M visa.

74. An F visa authorizes an international individual to enter the United States on a non-immigrant basis to pursue an educational program. Students on an F visa must be enrolled at an institution that participates in the Student and Exchange Visitor Program (SEVP).

75. An M visa authorizes international individuals to study at a vocational or technical school. Like those on F visas, students on an M visa must be enrolled at an approved institution.

76. Students on F and M visas come from every continent in the world except Antarctica, with more than 229 countries and territories represented in the U.S. academic

community. *See* ICE, *SEVIS by the Numbers: Biannual Report on International Student Trends*, 7 (Apr. 2018), goo.gl/d4gy2A.

77. In March 2018, approximately 1.2 million individuals were present in the United States on either an F or M visa. *Id.* at 3. Of these, approximately 400,000 students were enrolled in a bachelor's degree program, while nearly as many were seeking a Master's degree. *Id*. at 5.

78. In March 2018, approximately 8,700 schools have been certified by SEVP as eligible to enroll international students. *Id*. at 13.

79. A J visa is a non-immigrant visa issued to individuals who participate in an authorized "Exchange Visitor Program." The U.S. Department of State has authorized more than 1,500 academic institutions, for-profit and non-profit private sector organizations, or federal, state, and local government entities to operate such a program. The vast majority of these designated programs are accredited American institutions of higher education. Participants in such programs include students, research scholars, professors, teachers, physicians, au pairs, camp counselors, and several other categories of individuals.

80. More than 300,000 J visas were issued in 2017.

81. As of March 2018, around 210,000 individuals were present in the United States on a J visa.

82. Many U.S. colleges have determined that a robust community of international students is essential to the educational mission for *all* students—domestic and international alike. Domestic students gain critical new insights by living and studying with international students. These diverse environments teach essential values of multiculturalism and tolerance, breaking down stereotypes of the "other." International students, similarly, learn

from their American counterparts, gaining new experiences and perspectives that will benefit them for life.

83. Recruiting leading international students, researchers, and academics to U.S. schools is also crucial to ensuring that the United States retains its perch as the leader of the academic world. Higher education institutions are at the forefront of developing critical new technologies—in fields as diverse as healthcare, pharmaceuticals, computing, energy, and transportation. This innovation ensures the United States' status as the premier economic global force, thanks in significant measure to contributions by international students.

84. In the 2016 to 2017 school year, international students contributed nearly $37 billion to the U.S. economy and created or supported more than 450,000 jobs. *See* NAFSA, *NAFSA International Student Economic Value Tool*, goo.gl/kN6gSb. International students also contribute substantially to the economic health of the thousands of colleges and universities at which they enroll and thus pay tuition. For many of these communities, the higher education institution is the main engine or even sole guarantor of economic wellbeing.

"Unlawful Presence"

85. In the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Congress introduced sanctions for non-U.S. persons who are "unlawfully present" in the United States. The concept of "unlawful presence" had never previously existed in U.S. immigration law.

86. According to the statute, "an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." 8 U.S.C. § 1182(a)(9)(B)(ii).

87. If an individual accrues more than 180 consecutive days (but less than a year) of unlawful presence, the individual is barred from reentering the United States for a period of three years. 8 U.S.C. § 1182(a)(9)(B)(i)(I). If the individual has been unlawfully present in the United States for a year or more, the individual is barred from reentering the United States for a period of ten years. *Id.* § 1182(a)(9)(B)(i)(II).

88. When many categories of non-immigrants are admitted to the United States—such as most individuals coming to the United States as tourists or to temporarily engage in business—they are provided with a date certain on which their authorized period of stay expires, according to the I-94 Record of Admission. In these circumstances, calculating "unlawful presence" is relatively straightforward. If the individual stays after the specific date authorized, the individual begins to accrue "unlawful presence" time.

89. But most individuals admitted to the United States on F, J, and M visas are not provided a date certain on which their authorized period of stay expires. Rather, they are admitted for the "duration of status," or "D/S."

The Legacy Policy

90. Since 1997, Defendants—and their predecessors, including the Immigration and Naturalization Service—had adopted a consistent policy in practice for calculating "unlawful presence," including as it related to individuals admitted for a "duration of status."

91. In the August 2018 Policy Memorandum, Defendants explain the prior policy: "foreign students and exchange visitors (F and J non-immigrants, respectively) who were admitted for, or present in the United States in, duration of status (D/S) started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit or on the day after an

immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision is appealed), whichever came first." Ex. A at 1.

92. INS issued a memorandum on September 19, 1997, entitled "Section 212(a)(9)(B) Relating to Unlawful Presence." Ex. D. Written by Paul Virtue, then-Acting Executive Associate Commissioner, this document is often referred to as the "Virtue Memo."

93. The Virtue Memo provides: "Unlawful presence does not begin to run from the date of a status violation (including unauthorized employment). Unlawful presence for a nonimmigrant may begin to accrue before the expiration date noted on the I-94, however, in two circumstances: (1) when an immigration judge makes a determination of a status violation in exclusion, deportation or removal proceedings, or (2) when the Service makes such a determination during the course of adjudicating a benefit application." Ex. D at 2.

94. On May 6, 2009, USCIS issued an "Interoffice Memorandum" that it titled "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(c)(i)(I)." *See* Ex. C. That memorandum canvassed then-existing policies regarding unlawful presence and recodified them into the Adjudicator's Field Manual.

95. That memorandum provided: "Nonimmigrants Admitted for Duration of Status (D/S). If USCIS finds a nonimmigrant status violation while adjudicating a request for an immigration benefit, unlawful presence will begin to accrue on the day after the request is denied. If an immigration judge makes a determination of nonimmigrant status violation in exclusion, deportation, or removal proceedings, unlawful presence begins to accrue the day after the immigration judge's order. ***It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which***

removal proceedings are initiated." Ex. C at 25 (emphasis added).

The August 2018 Policy Memorandum

96. On May 11, 2018, Defendants posted a memorandum (dated May 10, 2018) indicating an intent to revise longstanding policy and legal interpretation regarding the definition and calculation of "unlawful presence." *See* Ex. B.

97. On August 9, 2018, Defendants issued a Policy Memorandum titled "Accrual of Unlawful Presence and F, J, and M Nonimmigrants." The memorandum is designated as PM-602-1060.1. It is attached as Exhibit A.

98. Pursuant to this new policy, USCIS will start the unlawful-presence clock *not* on the date that an individual on an F, J, or M visa is adjudicated as being out-of-status. Instead, USCIS will *backdate* "unlawful presence" to the date on which the underlying facts that gave rise to the status violation occurred.

99. Thus, under the new policy, "[a]n F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status on or after August 9, 2018, on . . . [t]he day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity." Ex. A at 4.

100. This new policy imposes a non-discretionary duty on USCIS officers. It binds and preordains their actions in all cases within the scope of the policy.

101. The August 2018 Policy Memorandum asserts certain overstay rates as a basis for reversing 21 years of policy. In particular, it asserts that the overstay rate is 6.19 percent for F-visa non-immigrants, 3.8 percent for J-visa non-immigrants, and 11.6 percent for M-visa non-immigrants. Ex. A at 2.

102. The overstay rates asserted in the August 2018 Policy Memorandum are misleading and inaccurate. In fact, USCIS does not have any accurate means of assessing overstay rates. SEVIS does not include a means to track departures from the United States by F, J, and M visa holders.

103. USCIS cites "out-of-country" overstay rates, describing individuals whose departure was recorded after their lawful period of admission expired. This likely encompasses individuals who stayed just a few days longer than the conclusion of their program to tie up their personal affairs and is not a true representation of the "overstay" population with which Defendants are concerned. Indeed, regulations specifically authorize individuals to stay in the United States during 30- and 60-day grace periods.

104. The "in-country" overstay rates have been calculated at much lower rates by Defendants.

105. The source on which USCIS relies for this information recognizes that calculating overstay rates is difficult and uncertain.

106. USCIS has admitted to being unable to know with certainty when many individuals on F, J, and M visas depart the United States. During an August 2018 stakeholder call, a DHS official conceded this point.

107. The August 2018 Policy Memorandum draws a distinction among non-immigrant classes without justification. Per the terms of the policy, individuals on F, J, or M visas begin accruing "unlawful presence" on the date that the facts give rise to that finding, while different "date certain" accrual rules apply to all other visa classes.

108. The August 2018 Policy Memorandum fails to offer any good reason to support the policy change.

109. The August 2018 Policy Memorandum asserts that "the Student and Exchange Visitor Information System (SEVIS)" "has provided USCIS officers additional information about an alien's immigration history, including information that indicates that an alien in F, J, or M nonimmigrant status may have completed or ceased to pursue his or her course of study or activity." Ex. A at 2.

110. The August 2018 Policy Memorandum fails to recognize the fact that SEVIS was created in 2002, and it was in effect no later than 2003. Defendants have offered no explanation as to why, 16 years later, the creation of SEVIS justifies a major policy change regarding unlawful presence.

111. When Defendants reaffirmed their earlier policy in the May 2009 Policy Memorandum, SEVIS had been operational for nearly six years.

112. The August 2018 Policy Memorandum identifies no change in facts or circumstances since the May 2009 Policy Memorandum.

113. The August 2018 Policy Memorandum does not identify any evidence that SEVIS has in fact aided accuracy.

114. Any contention by Defendants that SEVIS creates accurate adjudications is incorrect. As Defendants are aware, SEVIS is plagued with inaccurate information. For example, port-of-entry information entered into the system is often incorrect.

Promulgation of the Memorandum

115. Defendants did not undertake notice-and-comment rulemaking prior to issuing the August 2018 Policy Memorandum.

116. On May 10, 2018, Defendants issued a Policy Memorandum (May 2018 Policy Memorandum), proposing to change policy with respect to unlawful presence calculations

for F, J, and M visa holders. *See* Ex. B. The May 2018 Policy Memorandum purported to provide for a period of public comments. *See* Ex. B at 1.

117. Members of the public submitted comments in response to the May 10 notice, but the agency did not provide a reasoned response to those comments. Instead, USCIS merely stated in a press release, without further elaboration, that "[a]s a result of public engagement and stakeholder feedback, USCIS has adjusted the unlawful presence policy to address a concern raised in the public's comments." *See* Ex. E.

118. Defendants prepared no initial regulatory flexibility analysis.

119. The May 10 notice was not submitted for review by the Office of Management and Budget and was not published in the *Federal Register*.

120. None of the statutory exceptions to the requirement of notice-and-comment rulemaking is applicable here. *See* 5 U.S.C. § 553(b).

121. For example, the August 2018 Policy Memorandum reflects a legislative policy judgment, not interpretive guidance. The August 2018 Policy Memorandum does not engage in "interpretation" of the underlying statute. It does not quote the statutory text or explain how the policy it reflects is the better interpretation of the legal text compared with the status quo ante, which reflects more than 20 years of practice.

122. To the extent that Defendants provide any reasons at all for the policy, the reasoning is entirely policy-based.

123. The August 2018 Policy Memorandum was promulgated to effect Defendants' belief that it is a better policy compared with the status quo ante and thus should be the governing rule.

124. The August 2018 Policy Memorandum causes a change in existing law or

policy. The Memorandum expressly and repeatedly describes itself as establishing a "new policy," displacing the "former INS policy." *E.g.*, Ex. A at 2-3.

125. The August 2018 Policy Memorandum states a new policy that is a matter of considerable importance to the class of individuals it regulates, the higher education community, and the American public at large.

126. The August 2018 Policy Memorandum sets forth policy with present, binding effect.

127. The August 2018 Policy Memorandum admits of no discretion in its enforcement. Adjudicators must follow the Memorandum's requirements, with no choice.

128. The August 2018 Policy Memorandum has the force of law.

129. The August 2018 Policy Memorandum amends the USCIS Adjudicator's Field Manual. That Manual indicates that policy determinations of this sort are "binding" on USCIS employees: "All material which is designated as policy material is binding upon *all* employees of USCIS, unless or until it is specifically superseded by other policy material. There are no exceptions to this rule." USCIS, *USCIS Adjudicator's Field Manual* § 3.4(b), goo.gl/wnKdkx.

130. USCIS Adjudicator's Field Manual provides extensive guidance on distinguishing "correspondence" and "policy" materials. The Manual states:

> (a) Distinction between Correspondence and Policy.
>
> Headquarters and regional components are responsible for issuing a large volume of written material to field offices, the general public, congressional office and members of the private immigration bar. The vast majority of this material is a response to a direct, specific inquiry or a "hypothetical" situation. Other material is prepared as implementing instructions to accompany a new USCIS-wide program, policy or regulation. It is important to note that there is a distinction between "correspondence" and "policy" materials. ***Policy***

> ***material is binding on all USCIS officers and must be adhered to unless and until revised, rescinded or superseded by law, regulation or subsequent policy, either specifically or by application of more recent policy material.*** On the other hand, correspondence is advisory in nature, intended only to convey the author's point of view. Such opinions should be given appropriate weight by the recipient as well as other USCIS employees who may encounter similar situations. However, such correspondence does not dictate any binding course of action which must be followed by subordinates within the chain of command. Examples of policy materials are:
>
> . . .
>
> Field and Administrative Manuals
>
> . . .
>
> Memoranda and cables from Headquarters specifically designated as policy (bearing the "P" suffix in the reference file number).

USCIS, *USCIS Adjudicator's Field Manual* § 3.4(b), goo.gl/wnKdkx (emphasis added).

131. The August 2018 Policy Memorandum uses a "P" suffix in the reference file number for the August 2018 Policy Memorandum, PM-602-1060.1. Ex. A at 1.

132. The "P" suffix confirms that USCIS views the August 2018 Policy Memorandum as the sort of binding policy memorandum that permits no discretion. The Manual contrasts this with ten categories of correspondence—including "USCIS and General Counsel opinions" and "Training materials"—which are not binding.

133. When USCIS deems an individual to be unlawfully present and subject to a three- or a ten-year reentry bar, that bar applies only after an individual exits the United States and subsequently seeks to reenter the United States or reapplies for an immigration benefit. At that time, the doctrine of consular non-reviewability precludes judicial review of any USCIS determination regarding unlawful presence.

134. There is no meaningful way in which most individuals subject to a reentry bar

may seek judicial review over that determination.

135. Thus, while the August 2018 Policy Memorandum imposes binding obligations on USCIS officers, and while those obligations will have severe consequences on the individuals regulated as well as the academic communities to which they belong, those individual decisions by USCIS officers are not judicially reviewable.

136. While unlawful presence has a discretionary waiver process, the statute (8 U.S.C. § 1182(a)(9)(B)(v)) and regulation (8 C.F.R. § 212.7(e)(10)-(11)) make clear that waiver decisions are non-reviewable.

Harm Inflicted on International Students, Researchers, Employees, and Their Sponsoring Institutions

137. Promulgation of the August 2018 Policy Memorandum impairs the interests of students and employees at each institution who are present on F, J, and M visas.

138. Under the new policy, many more international students and employees will be subject to a three- or ten-year reentry bar as compared with the previous regulatory framework, even in the absence of any bad faith or even knowing conduct.

139. There are a multitude of ways in which a well-intentioned individual on an F, J, or M visa can be adjudicated out-of-status. Some of these include:

A. **Information update:** Failure of F, J, or M visa holder to update a Designated School Officer (DSO) regarding a change to information, including a change in address.

B. **Course load:** Failure to obtain proper approval for dropping below the minimum course load. Alternatively, USCIS may retroactively deny a request for a student to take a course-load below that typically required.

C. **Excess work:** A student on an F or M visa authorized to work 20 hours per week on campus works an hour extra one week to complete a deadline.

D. **Unauthorized employment:** Any employment by the spouse or child of an F, J, or M visa holder, including services as innocuous as babysitting.

E. **Designated School Officer (DSO) error:** There are a litany of errors a DSO may inadvertently make that may render a student out-of-status. Just a few examples include:

(i) Making a typographical error in SEVIS.

(ii) Erroneously identifying a student as having completed a course of study.

(iii) Inadvertently failing to register a student as returning for a particular semester.

(iv) Mistakenly entering an incorrect, premature school transfer date.

F. **Curricular Practical Training (CPT):** Curricular practical training, is the ability of some international students to work while attending school. For those international students on high financial aid, this can be a necessity if their home countries do not have a tax treaty with the U.S. disburdening them of the requirement of paying U.S. income tax on aid in excess of tuition; this tax can amount to thousands of dollars. CPT creates many opportunities for an individual to violate status:

(i) **Eligibility error:** After the fact, USCIS determines that CPT is not sufficiently "integral" to student's education and thus finds the CPT an unauthorized form of employment.

(ii) **OPT implications:** Student is not informed that a full year or more of CPT may preclude post-completion optional practical training.

G. **Optional Practical Training (OPT):** Students may generally apply for one year of post-graduate employment, called OPT, if it is training related to the completion of one's education. For students obtaining a degree in science, technology, engineering, or math (STEM), the student may extend OPT for an additional two years (STEM OPT) to complete their education. There are many ways in which an individual may inadvertently fall out-of-"status" in connection with OPT and STEM OPT:

(i) **Program approval:** Retroactive determination by USCIS that a

student's "optional practical training" does not qualify as sufficiently related to a student's degree.

(ii) **Absence reporting:** Failure of the employer of a student on optional practical training to provide a report as to any absence by a student.

(iii) **Training plan:** Failure of the employer of a student on optional practical training to provide a report as to any changes made to the student's training plan.

(iv) **Self-evaluation:** Failure of a student to provide an annual self-evaluation report or final evaluation—signed by the employer—regarding optional practical training.

(v) **Third-party placement:** Error made regarding third-party placement during an optional practical training designation.

(vi) **Worksite transfer:** USCIS determination, after the fact, that an international assignment was an impermissible worksite transfer.

(vii) **Miscalculation of unemployment periods:** DSO failure to properly calculate a student's unemployment periods between jobs, such that USCIS may determine that a student was not properly within STEM OPT status.

140. Many of these determinations rest on discretionary judgments by USCIS. Thus, it is impossible for an F, J, or M visa holder—or the institution of which they are a member—to know at the outset what conduct will render an individual out-of-status.

141. Under the prior policy, the unlawful-presence clock began after USCIS made these often-discretionary adjudications. That provided individuals 180 days to order their affairs and exit the country without accruing any reentry bar—or to otherwise regain status and avoid a reentry bar.

142. It was standard practice—endorsed by Defendants—for students who had fallen out-of-status to exit the country, and then reenter, beginning a new legal status.

Students and other individuals operating in good faith could thus generally cure an out-of-status finding, and therefore continue their education or cultural exchange programs in the United States.

143. The August 2018 Policy Memorandum, however, will backdate unlawful presence. That means that individuals will have less than 180 days, or often no time at all, to leave the country prior to being subject to a reentry bar.

144. In fact, because of delays in USCIS processing and immigration court backlogs, most of these adjudications will occur more than 180 days after the underlying facts giving rise to a status violation. In those circumstances, an F, J, or M visa holder will automatically be subject to a three-year reentry bar with no opportunity to cure whatsoever.

145. Because of processing delays, and also because USCIS may make a status-violation finding during a subsequent request for adjustment of status, many of these adjudications will occur 365 days or more after the underlying facts giving rise to a status violation. In those circumstances, an F, J, or M visa holder will automatically be subject to a ten-year reentry bar with no opportunity to cure whatsoever.

146. By design, the August 2018 Policy Memorandum will result in many more holders of F, J, and M visas being subject to three- and ten-year reentry bars.

147. When a student on an F, J, or M visa is subject to a reentry bar, that student is not able to continue enrollment at the academic institution. This disrupts the student-school relationship. It also costs the school tuition revenue.

148. Moreover, because the August 2018 Policy Memorandum starts the unlawful-presence clock at an earlier time, it causes colleges and universities to make different decisions about international students, including by requiring international students to stop

their education following a finding by the school that there has been an inadvertent status violation.

149. When an individual participating in a J-visa cultural exchange program is subject to a reentry bar, Plaintiff loses that valuable, trained member of the community. The institution suffers financial losses when it must hire and train new individuals to fulfill the duties of the individual barred from reentering the country. This harm accrues with respect to international research scholars and others on cultural exchange programs. It also stems from students who work for the university in connection with an approved on-campus employment.

150. When a researcher on a J-1 visa is forced to leave the United States, the university or college irreparably loses valuable research projects. The researcher's career is forever disrupted. And the critical relationship between researcher and employer is upset.

151. Plaintiffs provide international students and exchange visitors material advice as to what they may and may not do to maintain their visa status. Plaintiffs have developed these policies and practices in reliance on the fact that an F, J, or M visa holder will not begin to accrue "unlawful presence" unless and until a government official adjudicates the individual as out-of-status. Plaintiffs' policies thus relied on the preexisting policy. The August 2018 Policy Memorandum topples the basis on which Plaintiffs and other institutions structured their international student advising offices, policies, and practices.

152. Now, many schools and universities have changed the advising they provide, and they provide fewer advising services to their international students and researchers. That constitutes a loss to the university or college: the institution is unable to service the critical needs of its community members, precisely because the August 2018 Policy Memorandum

upset long-settled expectations.

153. What is more, by failing to allow notice-and-comment, Defendants denied Plaintiffs their opportunity to comment and provide reasons to forego (or at least alter) the change to the unlawful presence policy. There is no doubt that Plaintiffs—and associations of which they are members—would have engaged in the comment process. Even though there was no valid comment process, the American Federation of Teachers nonetheless submitted a response to the online posting, and it certainly would have submitted formal comments if given the opportunity. It signed a multi-union member with the AFL-CIO. *See* https://goo.gl/Zt8uSU. Moreover, several major associations of higher education joined together to file a letter opposing the change. One letter was signed by the Association of Public and Land-grant Universities, the Association of American Universities, the American Association of Community Colleges, the American Association of State Colleges and Universities, the American Council on Education, the Association of Jesuit Colleges and Universities, and the National Association of Independent Colleges and Universities. *See* https://goo.gl/ZnQJuc. Plaintiff Foothill-De Anza Community College District is a member of the American Association of Community Colleges. Haverford College and Guilford College are members of the National Association of Independent Colleges and Universities. Guilford College, Haverford College, The New School, and Foothill-De Anza Community College District are all members of the American Council on Education.

Harm Inflicted on the MAVNIs

154. As we described, individuals who were recruited by and enlisted in the military are also directed impacted by the August 2018 Policy Memorandum. Many of these individuals, often called "MAVNIs," were recruited while on F, J, or M visas. This includes

Plaintiffs Ye and Li, who were both recruited by the military and enlisted while on an F-1 visa.

155. MAVNIs on F, J, or M visas relied on preexisting policies regarding unlawful presence. In particular, the MAVNIs understood that they would not accrue unlawful presence while they waited for their orders to report to basic training. The MAVNIs thus enlisted in the U.S. military—and they structured their lives—in reliance on the preexisting policy.

156. The August 2018 Policy Memorandum changes all of that. Now, as USCIS stated during an August 2018 stakeholder call, the August 2018 Policy Memorandum results in MAVNIs who have completed their education and are awaiting orders to report to basic training being deemed "unlawfully present" in the United States. The direct effect is that these individuals are now subject to three- and ten-year reentry bars.

157. Plaintiffs Ye and Li are thus directly injured by the August 2018 Policy Memorandum. Under the prior policy, Ye and Li would not currently be accruing unlawful presence. Under the August 2018 Policy Memorandum, however, USCIS appears to be taking the position that Ye and Li *are* accruing unlawful presence. After more than 180 days have elapsed, USCIS will then take the position that Ye and Li are subject to an irrevocable three-year reentry bar. That bar will grow to ten years after 365 days have elapsed.

158. Ye and Li's harms are direct and immediate. What is more, unless the Court acts prior to February 5, 2019, Ye will be irreparably harmed. Until February 5, 2019, Ye may leave the country prior to more than 180 days elapsing, so as to preclude imposition of a reentry bar. After that date, defendants will take the position that Ye is subject to a reentry bar after he next leaves. USCIS will likely contend that Li's unlawful presence clock follows

shortly thereafter. Timely relief is thus crucial for them to avoid irreparable harm.

159. The imposition of a reentry bar is not normally subject to any form of judicial review. That is in part because the reentry bar does not attach until an individual first leaves the United States. While still in the United States, an individual typically has no opportunity to contest the reentry bar. After the individual leaves the country, the government contends that the doctrine of consular nonreviewability bars courts from reviewing imposition of a reentry bar.

160. Leaving the country is not an option. Indeed, the U.S. military informed MAVNIs that they should *not* leave the United States prior to basic training, as that would like disrupt—if not end—their security clearance process. Moreover, the individual may not be available for basic training when called. Leaving the United States is thus inconsistent with the requirements imposed on the MAVNIs.

STANDING

Standing of the MAVNIs

161. As just described, Plaintiffs Ye and Li are directly injured by the August 2018 Policy Memorandum.

Independent Standing of University Plaintiffs

162. Because the August 2018 Policy Memorandum was issued without being submitted through formal notice-and-comment rulemaking, Plaintiffs had no meaningful opportunity to provide pre-decisional comments and feedback to the agency. Defendants' failure to provide an adequate opportunity for public comment prior to acting has caused both Plaintiffs and their students and employees injury. All Plaintiffs therefore have been aggrieved by promulgation of the Rule. *See generally JEM Broad. Co. v. FCC*, 22 F.3d 320,

326 (D.C. Cir. 1994).

163. Plaintiffs invest substantial resources in programs designed to assist their students and employees with obtaining and maintaining lawful immigration status. In particular, Plaintiffs, as SEVP-certified institutions, have hired and are required to train Designated School Officers that provide advice to each institution's international students. The Rule has changed the regulatory framework and consequently will require Plaintiffs to expend additional resources on new training and assistance. Plaintiffs therefore have standing to challenge the Rule in their own right. *See generally Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982).

164. Because the August 2018 Policy Memorandum makes it significantly easier for well-intentioned students to become subject to a three- or ten-year bar to reentry, many students will have their educations in this country fundamentally disrupted.

165. The loss to the campus environment is substantial: the school is injured because the August 2018 Policy Memorandum removes a student that the school had specifically chosen to attend. That imposes a direct, irreparable harm on the institution and all its members.

166. Additionally, Plaintiffs will lose tuition revenue from international students who are subject to three- and ten-year reentry bars.

167. The August 2018 Policy Memorandum will also chill international students' willingness to attend institutions of higher education, including the Plaintiff institutions, in the United States. This chilling effect will further cause a loss of revenue to Plaintiffs, and it will hinder the ability of Plaintiffs to attract the international, diverse community that they believe essential.

168. Plaintiffs' injuries are caused directly by the August 2018 Policy Memorandum. And their injuries would be redressed by an order vacating, invalidating, or otherwise declaring unlawful the August 2018 Policy Memorandum.

169. Because of potential liability stemming from the consequences of advising students, many colleges and universities are reducing the scope of advising supplied to international students and other international members of their communities.

Associational Standing of University Plaintiffs

170. Plaintiffs' students have standing to sue in their own right as parties regulated under the August 2018 Policy Memorandum.

171. Neither the claims asserted nor the relief requested in this lawsuit requires individual students' or employees' participation in this lawsuit.

172. Plaintiffs' missions as institutions of higher education include representing and advocating for the interests and rights of their students and employees before government bodies.

173. Plaintiffs' students and employees are formal members of each school. Students pay tuition, dues, and other fees and are accordingly afforded the formal benefits of membership in the school community. Each Plaintiff is therefore a formal association of students and faculty who join together in pursuit of their educational mission.

174. Plaintiffs' and their members' injuries would be redressed by an order vacating, invalidating, or otherwise declaring unlawful the August 2018 Policy Memorandum.

Associational Standing of Guilford College International Club

175. Guilford College International Club is a voluntary association whose members

include Guilford students present in the United States on F-1 visas.

176. Members of Guilford College International Club present in the United States on F-1 visas have standing to sue in their own right as parties regulated under the August 2018 Policy Memorandum.

177. Neither the claims asserted nor the relief requested in this lawsuit requires individual members' participation in this lawsuit.

178. Guilford College International Club's mission includes advocating for the rights of its international student members. In celebrating and advocating for diversity, moreover, Guilford College International Club counts as among its mission advocating for policies that ensure its members present on F-1 visas have full and fair opportunity to be present in the United States without undue fear about the imposition of a three- or ten-year reentry bar.

179. Guilford College International Club's and their members' injuries would be redressed by an order vacating, invalidating, or otherwise declaring unlawful the August 2018 Policy Memorandum.

Associational Standing of the American Federation of Teachers

180. The American Federation of Teachers is a labor organization. Its members pay dues and receive the benefits of membership in AFT.

181. AFT's members include individuals who are present in the U.S. on both F and J visas.

182. AFT's mission includes advancing the interests of its members, including supporting commonsense policies that promote immigration opportunities for individuals who wish to serve as teachers. To fulfill this mission, AFT advocates for its members'

interests before government bodies and in court.

183. Neither the claims asserted nor the relief requested in this lawsuit requires participation of individual AFT members in this lawsuit in this lawsuit.

184. AFT's injuries in this case—and those sustained by their members—would be redressed by an order vacating, invalidating, or otherwise declaring unlawful the August 2018 Policy Memorandum.

FIRST CAUSE OF ACTION:
THE AUGUST 2018 POLICY MEMORANDUM WAS ISSUED WITHOUT OBSERVANCE OF PROCEDURE REQUIRED BY LAW

185. Plaintiffs incorporate by reference the preceding allegations of this Complaint.

186. Under the Administrative Procedure Act, an agency must provide "[g]eneral notice of proposed rule making … published in the Federal Register" whenever the agency seeks to promulgate a rule. 5 U.S.C. § 553(b). After the agency has published the required notice, "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id.* § 553(c).

187. Following the submission of comments, the agency must then respond to those comments. "[I]nextricably intertwined with . . . 5 U.S.C. § 553(c) is the agency's need to respond, in a reasoned manner, to any comments received by the agency that raise significant issues with respect to a proposed rule." *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1379 n.11 (Fed. Cir. 2017). "[C]onsideration of comments as a matter of grace is not enough. It must be made with a mind that is open to persuasion." *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994) (citation and alteration omitted).

188. Several other legal obligations follow from a Section 553 rulemaking

procedure. For example, 5 U.S.C. § 603 requires the preparation of an "initial regulatory flexibility analysis."

189. Defendants did not undertake notice-and-comment rulemaking prior to issuing the August 2018 Policy Memorandum.

190. Defendants prepared no initial regulatory flexibility analysis.

191. Although the agency purported to accept comments in its May notice, this procedure was not an authorized alternative to the required rulemaking.

192. The August 2018 Policy Memorandum was therefore issued "without observance of procedure required by law" and is invalid under 5 U.S.C. § 706(2)(D).

SECOND CAUSE OF ACTION:
THE AUGUST 2018 POLICY MEMORANDUM IS SUBSTANTIVELY ARBITRARY AND CAPRICIOUS

193. Plaintiffs incorporate by reference the preceding allegations of this Complaint.

194. The August 2018 Policy Memorandum constitutes a substantial change in policy from approximately 20 years of prior behavior.

195. "[U]nexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (citation and quotation marks omitted). Defendants have failed to provide "good reasons for the new policy." *Id*.

196. Defendants assert that the basis for the policy change is enhanced accuracy in their data that has been caused by the use of SEVIS. But Defendants fail to recognize that SEVIS has been fully operational since August 2003, and Defendants fail to identify any change in circumstances since May 2009, when they previously reaffirmed their longstanding policy.

197. Defendants also rely on faulty data. Assuming for the sake of argument that the overstay rate is relevant, Defendants have relied on the wrong and inaccurate data in assessing the overstay rate.

198. Defendants have failed to identify any match between the alleged problem—asserted overstays of F, J, and M visa holders—and the August 2018 Policy Memorandum. Given that the new policy fails to identify how it will address overstay rates, the policy is arbitrary and capricious.

199. The status quo ante has engendered serious reliance interests that must be taken into account. Defendants did not acknowledge these interests or take them into account.

200. Moreover, Defendants now treat similarly situated individuals differently. USCIS does not, for example, backdate an out-of-status finding regarding an individual on an H-1B visa for purposes of unlawful presence. This is consistent with the statutory definition and over 20 years of interpretation. The August 2018 Policy Memorandum singles out F, J, and M visa holders, subjecting them to unique, harsh regulations. Defendants do not address, much less justify, why individuals on F, J, and M visas are treated more harshly than are individuals present in the United States via other kinds of visas.

201. The August 2018 Policy Memorandum accordingly is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and is invalid under 5 U.S.C. § 706(2)(A).

THIRD CAUSE OF ACTION: THE AUGUST 2018 POLICY MEMORANDUM IS INCONSISTENT WITH THE STATUTORY TEXT

202. Plaintiffs incorporate by reference the preceding allegations of this Complaint.

203. The August 2018 Policy Memorandum is "unlawful" because it is "in excess of

statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). Because the policy conflicts with the governing statute, it is invalid and may not be enforced.

204. 8 U.S.C. § 1182(a)(9)(B)(ii) provides in relevant part that "an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General."

205. This statute created the concept of "unlawful presence." The concept did not previously exist in immigration law.

206. Prior to 1996, however, other related concepts had existed. In particular, prior statutes addressed individuals in "unlawful status" (*see, e.g.*, 8 U.S.C. § 1255a) and "unlawful immigration status" (*see, e.g.*, *id.* § 1255). The 1996 Act did not use the well-established concept of "status," but instead created a new category of "unlawful presence."

207. USCIS observed in 2009 that there is a critical distinction between unlawful status and unlawful presence. As USCIS wrote in its May 2009 memorandum (Ex. C at 9):

> **(2) Distinction Between "Unlawful Status" and "Unlawful Presence"**
>
> To understand the operation of sections 212(a)(9)(B) and 212(a)(9)(C)(i)(I) of the Act, it is important to comprehend the difference between being in an unlawful immigration status and the accrual of unlawful presence ("period of stay not authorized"). Although these concepts are related (one must be present in an unlawful status in order to accrue unlawful presence), they are not the same.
>
> As discussed in chapters 40.9.2(b)(2) and (3), there are situations in which an alien who is present in an unlawful status nevertheless does not accrue unlawful presence.

208. The plain statutory text dictates the same result here. When a visa holder is provided a date certain on which the visa expires, including via a date certain on a Form I-94, then the "expiration" of the "period of stay authorized by the Attorney General" is concrete.

The period of stay authorized expires on the date stated.

209. By contrast, when a visa holder is admitted for the "duration of status," the "period of stay authorized" reaches "expiration" when the Attorney General makes a finding that the person is out-of-"status," a decision which thus terminates the "period of stay authorized."

210. 8 U.S.C. § 1202(g) likewise applies to an individual who has "remained in the United States beyond the period of stay authorized by the Attorney General." The prevailing policy embodied in this statute is at odds with the August 2018 Policy Memorandum.

211. The August 2018 Policy Memorandum is therefore "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" and is invalid under 5 U.S.C. § 706(2)(C).

FOURTH CAUSE OF ACTION:
THE AUGUST 2018 POLICY MEMORANDUM VIOLATES THE FIFTH AMENDMENT'S DUE PROCESS GUARANTEE

212. Plaintiffs incorporate by reference the preceding allegations of this Complaint.

213. The August 2018 Policy Memorandum violates the procedural and substantive protections of the Fifth Amendment's Due Process Clause.

214. Whether Defendants will determine that a particular individual is within permissible "status" on an F, J, or M visa is a decision that an individual cannot know with certainty at the outset. Not only do new circumstances create novel legal questions, but—in many cases—there are discretionary judgment calls and inconsistent interpretations of language in regulations and policy memoranda that determine whether someone is within or without status.

215. The holder of an F, J, or M visa cannot therefore know with any confidence

what conduct will cause a USCIS official or immigration judge to later deem him or her to be outside approved "status."

216. Under the prior policy, an individual was provided notice *before* he or she could be subject to the harsh penalty and restriction of freedom that is a three- or ten-year reentry bar.

217. Now, however, the August 2018 Policy Memorandum renders it impossible for an individual to know with certainty what conduct will trigger such a reentry bar. An individual may commit conduct that he or she has no reasonable way of knowing will later cause an USCIS officer or immigration judge to later declare him or her "out-of-status," and—because of the new policy of backdating—will be immediately subject to a reentry bar once that decision is made.

218. In this way, the August 2018 Policy Memorandum makes the imposition of the three- and ten-year bars to reentry unpredictable, vague, and arbitrary.

219. The Due Process Clause provides F, J, and M visa holders the right to notice and an opportunity to cure prior to imposition of a three- or ten-year reentry bar. Because the August 2018 Policy Memorandum precludes that essential right, it is unlawful.

220. Under the August 2018 Policy Memorandum, if an F, J, or M visa's principal holder is deemed to be unlawfully present, so too will those individuals whose visas are derivative of and dependent upon the principal's visa. Because those derivative visa holders may have no knowledge of the activities of the F, J, or M visa holder that renders the principal out-of-status, they lack the notice and opportunity to cure that is required by the Due Process Clause.

221. The August 2018 Policy Memorandum is therefore "contrary to constitutional

right, power, privilege, or immunity" and invalid under 5 U.S.C. § 706(2)(B).

REQUEST FOR RELIEF

For the foregoing reasons, Plaintiffs request that the Court:

a) declare that the August 2018 Policy Memorandum is unlawful;

b) vacate the August 2018 Policy Memorandum;

c) enjoin Defendants from enforcing or applying any aspect of the August 2018 Policy Memorandum;

d) grant Plaintiffs their costs in this action, including reasonable attorneys' fees incurred; and

e) award other relief that the Court deems just and proper.

Respectfully submitted,

/s/ Paul W. Hughes

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* *Notice of Special Appearance Forthcoming*

Dated: December 14, 2018

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and have verified that such filing was sent electronically using the CM/ECF system to counsel for defendants.

Dated: December 14, 2018 /s/ *Paul W. Hughes*

Exhibit A

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

August 9, 2018 **PM-602-1060.1**

Policy Memorandum

SUBJECT: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Purpose

This Policy Memorandum (PM) provides guidance to U.S. Citizenship and Immigration Services (USCIS) officers and assists USCIS officers in the calculation of unlawful presence of those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States. The PM also revises previous policy guidance in the USCIS Adjudicator's Field Manual (AFM) relating to this issue.

Authority

- INA 212(a)(9)(B)
- INA 212(a)(9)(C)

Background

Since the creation of the U.S. Department of Homeland Security (DHS), USCIS has followed the former Immigration and Naturalization Service's (INS) various policies on the accrual of unlawful presence. In 2009, USCIS consolidated its prior policy guidance in AFM Chapter 40.9.2.[1]

According to that policy—to be superseded by this policy memorandum—foreign students and exchange visitors (F and J nonimmigrants, respectively) who were admitted for, or present in the United States in, duration of status (D/S) started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision is appealed), whichever came first. F and J nonimmigrants, and foreign vocational students (M nonimmigrants), who were admitted until a specific date (date certain) accrued unlawful presence on the day after their Form I-94 expired, on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after an immigration judge ordered the

[1] See USCIS Interoffice Memorandum, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act" (May 6, 2009).

applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came first.[2]

The former INS policy, as consolidated in the AFM, went into effect in 1997, prior to the creation of some of the technologies and systems currently used by DHS to monitor nonimmigrants who are admitted to the United States in or otherwise acquire F, J, or M nonimmigrant status. Over the years, DHS also has made significant progress in its ability to identify and calculate the number of nonimmigrants who have failed to maintain status, including certain F, J, and M nonimmigrants.[3]

For example, since the creation of the policy, the Student and Exchange Visitor Information System (SEVIS)—the DHS system used to monitor F, J, and M nonimmigrants—has provided USCIS officers additional information about an alien's immigration history, including information that indicates that an alien in F, J, or M nonimmigrant status may have completed or ceased to pursue his or her course of study or activity, as outlined in Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, and related forms, or Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status. For FY 2016, DHS calculated that a total of 1,457,556 aliens admitted in F, J, and M nonimmigrant status were either expected to change status or depart the United States. Of this population, it was estimated that the total overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants.[4][5]

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[2] Under the former policy, an alien admitted for duration of status who overstayed or violated such status did not immediately begin accruing a period of unlawful presence for purposes of INA 212(a)(9)(B). Nevertheless, such alien was illegally present in the United States and would be amenable to removal proceedings under INA 237(a)(1)(C), which renders deportable aliens who violate their nonimmigrant status or any condition of their entry. Moreover, such aliens could be charged and ultimately convicted of any criminal offense requiring the alien to be illegally or unlawfully present in the United States as an element of the offense. For example, aliens who were admitted for duration of status and either violated or overstayed such status were treated as being illegally or unlawfully present in the United States for purposes of criminal culpability under the firearms provisions at 18 U.S.C. §§ 922(a)(6) and 922(g)(5). See *United States v. Rehaif*, 888 F.3d 1138 (11th Cir. 2018) (holding that a student who was academically dismissed, failed to depart the United States immediately, and therefore violated the terms of his F-1 status was unlawfully present for purposes of 18 U.S.C. § 922(g)(5)(A)); *United States v. Atandi*, 376 F.3d 1186, 1188 (10th Cir. 2004) ("Rather, we hold that an alien who is only permitted to remain in the United States for the duration of his or her status (as a student, for example) becomes 'illegally or unlawfully in the United States' for purposes of § 922(g)(5)(A) upon commission of a status violation."); *United States v. Bazargan*, 992 F.2d 844, 847 (8th Cir. 1993) ("A nonimmigrant alien F-1 student becomes an illegal alien subject to deportation by failing to comply with the transfer procedures set forth in the INS regulations."); *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985) (per curiam) ("After failing to maintain the student status required by his visa, Igbatayo was without authorization to remain in this country.").

[3] See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, *available at* https://www.dhs.gov/publication/entryexit-overstay-report.

[4] See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, page 12, *available at* https://www.dhs.gov/publication/entryexit-overstay-report.

[5] On August 7, 2018, DHS issued the Fiscal Year 2017 Entry/Exit Overstay Report as this memorandum was being finalized for publication. For FY2017, DHS calculated that a total of 1,662,369 aliens admitted in F, J, and M nonimmigrant status were expected either to change status or depart the United States, and estimated that the total overstay rate was 4.07 percent for F nonimmigrants, 4.17 percent for J nonimmigrants, and 9.54 percent for M nonimmigrants. These figures continue to be significantly higher than those for other nonimmigrant categories. See Fiscal Year 2017 Entry/Exit Overstay Report, Department of Homeland Security, page 11, available at

To reduce the number of overstays and to improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I), USCIS is now changing its policy on how to calculate unlawful presence for F-1, J-1, and M-1 nonimmigrants, and their dependents (F-2, J-2, and M-2).

Effective Date

This new guidance on the accrual of unlawful presence with respect to F, J, and M nonimmigrants will take effect on August 9, 2018. The policy for determining unlawful presence for aliens present in the United States who are not in F, J, or M nonimmigrant status remains unchanged.

This guidance supersedes any prior guidance on this topic, including in its entirety the May 10, 2018 PM titled "Unlawful Presence and F, J, and M Nonimmigrants."

Policy

The new policy clarifies that F, J, and M nonimmigrants, and their dependents, admitted or otherwise authorized to be present in the United States in duration of status (D/S) or admitted until a specific date (date certain), start accruing unlawful presence as outlined below.[6]

F, J, or M nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018.

F, J, or M nonimmigrants who failed to maintain their nonimmigrant status[7] before August 9, 2018 start accruing unlawful presence based on that failure on August 9, 2018,[8] unless the alien had already started accruing unlawful presence on the earliest of the following:

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https://www.dhs.gov/publication/fiscal-year-2017-entryexit-overstay-report. Accordingly, USCIS believes that the data presented in the FY2017 report continues to support this policy change.

[6] Unless the nonimmigrant is otherwise protected from accruing unlawful presence, as outlined in AFM Chapter 40.9.2.

[7] The day the alien failed to maintain status may be determined by a DHS officer. For example, an F, J, or M nonimmigrant may fail to maintain status if he or she no longer is pursuing the course of study or the authorized activity before completing his or her course of study or program, or engages in an unauthorized activity. An F, J, or M nonimmigrant also may fail to maintain his or her status if the alien remains in the United States after having completed the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2). Additionally, an F, J, or M nonimmigrant who is admitted for a date certain on his or her Form I-94, Arrival/Departure Record and remains in the United States beyond that date may fail to maintain his or her status. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I), and that determination is based on derogatory information of which the alien is unaware, the officer generally will give the alien an opportunity to rebut that derogatory information.

[8] An F, J, or M nonimmigrant who failed to maintain status before the effective date of this memorandum and remains in the United States without maintaining lawful status is generally present in violation of U.S. immigration laws. Nevertheless, if DHS makes the inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) on or after August 9, 2018, unlawful presence for such an alien begins accruing on August 9, 2018 and may continue to accrue for as long as the alien remains in unlawful status in the United States, unless the alien is or becomes otherwise protected from accruing unlawful presence, as outlined in this AFM Chapter 40.9.2.

- The day after DHS denied the request for an immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;[9]

- The day after the Form I-94, Arrival/Departure Record, expired, if the F, J, or M nonimmigrant was admitted for a date certain; or

- The day after an immigration judge ordered the alien excluded, deported, or removed (whether or not the decision is appealed).

F, J, or M nonimmigrants who failed to maintain nonimmigrant status on or after August 9, 2018

An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status[10] **on or after** August 9, 2018, on the earliest of any of the following:

- The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;

- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2);

- The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or

- The day after an immigration judge orders the alien excluded, deported, or removed (whether or not the decision is appealed).

When assessing whether an F, J, or M nonimmigrant accrued unlawful presence and was no longer in a period of stay authorized, the USCIS officer should consider information relating to the alien's immigration history, including but not limited to:

- Information contained in the systems available to USCIS;

- Information contained in the alien's record;[11] and

[9] Note that the policy for determining when unlawful presence begins to accrue remains unchanged for F, J, and M nonimmigrants for whom DHS made a formal finding of violation of nonimmigrant status before August 9, 2018.
[10] The day the alien failed to maintain his or her status may be determined by a DHS officer. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer, shall give the alien an opportunity to rebut that derogatory information.
[11] This includes the alien's admissions regarding his or her immigration history or other information discovered during the adjudication.

- Information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), if any. The officer should follow current USCIS guidance on the issuance of RFEs or NOIDs.[12]

The period of stay authorized for an F-2, J-2, or M-2 nonimmigrant dependent (spouse or child) admitted for D/S or for a date certain is contingent on the F-1, J-1, or M-1 nonimmigrant remaining in a period of stay authorized. An F-2, J-2, or M-2 nonimmigrant's period of stay authorized ends when the F-1, J-1, or M-1 nonimmigrant's period of stay authorized ends. In addition, an F-2, J-2, or M-2 nonimmigrant's period of stay authorized may end due to the F-2, J-2, or M-2 nonimmigrant dependent's own conduct or circumstances.

This new guidance on the accrual of unlawful presence with respect to F, J, and M nonimmigrants will take effect on August 9, 2018. The policy for determining unlawful presence for aliens present in the United States who are not in F, J, or M nonimmigrant status remains unchanged.

This guidance supersedes any prior guidance on this topic.

Implementation

Chapter 40.9.2 of the AFM is revised by:

- Adding "Other than F, J, or M Nonimmigrants" to the heading of section 40.9.2(b)(1)(E)(i);
- Adding "Other Than F or J Nonimmigrants" to the heading of section 40.9.2(b)(1)(E)(ii);
- Creating a new section 40.9.2(b)(1)(E)(iii);
- Redesignating current section 40.9.2(b)(1)(E)(iii) as section 40.9.2(b)(1)(E)(iv) and amending the text; and
- Revising the text of section 40.9.2(b)(3)(D).

These revised AFM Chapter 40.9.2 sections, as amended, read as follows:

* * *

(b) Determining When an Alien Accrues Unlawful Presence

* * *

(1) Aliens Present in Lawful Status or as Parolees

[12] The USCIS assessment is made under the preponderance of the evidence standard. See *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

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(E) Lawful Nonimmigrants

The period of stay authorized for a nonimmigrant may end on a specific date or may continue for "duration of status (D/S)." Under current USCIS policy, nonimmigrants begin to accrue unlawful presence as follows:

(i) Nonimmigrants Admitted Until a Specific Date (Date Certain) Other Than F, J, or M Nonimmigrants

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(ii) Nonimmigrants Admitted for Duration of Status (D/S) Other Than F or J Nonimmigrants

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(iii) F or J Nonimmigrants Admitted for Duration of Status (D/S) or F, J, or M Nonimmigrants Admitted Until a Specific Date (Date Certain)

Background

Since the creation of the U.S. Department of Homeland Security (DHS), USCIS has followed the former Immigration and Naturalization Service's (INS) various policies on the accrual of unlawful presence. In 2009, USCIS consolidated its prior policy guidance in this AFM chapter.[13]

According to that policy—now superseded by this guidance—foreign students and exchange visitors (F and J nonimmigrants, respectively) admitted for, or present in the United States in, duration of status (D/S) started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision is appealed), whichever came first. F and J nonimmigrants, and foreign vocational students (M nonimmigrants), admitted until a specific date (date certain) accrued unlawful presence on the day after their Form I-94 expired, or on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came

[13] See USCIS Interoffice Memorandum, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act" (May 6, 2009).

first. [14]

The former INS policy, as consolidated in the AFM, went into effect in 1997 prior to the creation of some of the technologies and systems currently used by DHS to monitor nonimmigrants who are admitted to the United States in or otherwise acquire F, J, or M nonimmigrant status. Over the years, DHS has also made significant progress in its ability to identify and calculate the number of nonimmigrants who have failed to maintain status, including certain F, J, or M nonimmigrants.[15]

For example, since the creation of the policy, the Student and Exchange Visitor Information System (SEVIS)—the DHS system used to monitor F, J, and M nonimmigrants—has provided USCIS officers additional information about an alien's immigration history, including information that indicates that an alien in F, J, or M nonimmigrant status may have completed or ceased to pursue his or her course of study or activity, as outlined in Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, and related forms, or Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status. For FY 2016, DHS calculated that a total of 1,457,556 aliens admitted in F, J, and M nonimmigrant status were either expected to change status or depart the United States. Of this population, it was estimated that the total overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants.[16]

To reduce the number of overstays and to improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I), USCIS changed its policy on how to calculate unlawful presence for F-1, J-1, and M-1 nonimmigrants, and their dependents (F-2, J-2, and M-2) effective on August 9, 2018.

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[14] Under the former policy, an alien admitted for duration of status who overstayed or violated such status did not immediately begin accruing unlawful presence for purposes of INA 212(a)(9)(B). Nevertheless, such alien was illegally present in the United States and would be amenable to removal proceedings under INA 237(a)(1)(C), which renders deportable aliens who violate their nonimmigrant status or any condition of their entry. Moreover, such aliens could be charged and ultimately convicted of any criminal offense requiring the alien to be illegally or unlawfully present in the United States as an element of the offense. For example, aliens who were admitted for duration of status and either violated or overstayed such status were treated as being illegally or unlawfully present in the United States for purposes of criminal culpability under the firearms provisions at 18 U.S.C. §§ 922(a)(6) and 922(g)(5). *See United States v. Rehaif*, 888 F.3d 1138 (11th Cir. 2018) (holding that a student who was academically dismissed, failed to depart the United States immediately, and therefore violated the terms of his F-1 status was unlawfully present for purposes of 18 U.S.C. § 922(g)(5)(A)); *United States v. Atandi*, 376 F.3d 1186, 1188 (10th Cir. 2004) ("Rather, we hold that an alien who is only permitted to remain in the United States for the duration of his or her status (as a student, for example) becomes 'illegally or unlawfully in the United States' for purposes of § 922(g)(5)(A) upon commission of a status violation."); *United States v. Bazargan*, 992 F.2d 844, 847 (8th Cir. 1993) ("A nonimmigrant alien F-1 student becomes an illegal alien subject to deportation by failing to comply with the transfer procedures set forth in the INS regulations."); *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985) (per curiam) ("After failing to maintain the student status required by his visa, Igbatayo was without authorization to remain in this country.").

[15] See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, available at https://www.dhs.gov/publication/entryexit-overstay-report.

[16] See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, page 12, available at https://www.dhs.gov/publication/entryexit-overstay-report.

Policy

Foreign students (F-1 nonimmigrants), exchange visitors (J-1 nonimmigrants), and vocational students (M-1 nonimmigrants), and their dependents, admitted or otherwise authorized to be present in the United States in duration of status (D/S) or admitted until a specific date (date certain) (in accordance with 8 CFR 214.2(f), 8 CFR 214.2(j), or 8 CFR 214.2(m)) start accruing unlawful presence as outlined below.[17]

When assessing whether an F, J, or M nonimmigrant accrued unlawful presence and was no longer in a period of stay authorized, the USCIS officer should consider information relating to the alien's immigration history, including but not limited to:

- Information contained in the systems available to USCIS;
- Information contained in the alien's record;[18] and
- Information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), if any. The officer should follow current USCIS guidance on the issuance of RFEs or NOIDs.[19]

F, J, or M nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018

F, J, or M nonimmigrants who failed to maintain their nonimmigrant status[20] before August 9, 2018 start accruing unlawful presence based on that failure on August 9, 2018**,** [21] unless the alien had already started accruing unlawful presence on the earliest of the following:

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[17] Unless the nonimmigrant is otherwise protected from accruing unlawful presence, as outlined in AFM Chapter 40.9.2.

[18] This includes the alien's admissions regarding his or her immigration history or other information discovered during the adjudication.

[19] The assessment is made under the preponderance of the evidence standard. See *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

[20] The day the alien failed to maintain status may be determined by a DHS officer. For example, an F, J, or M nonimmigrant may fail to maintain status if he or she no longer is pursuing the course of study or the authorized activity before completing his or her course of study or program, or engages in unauthorized activity. An F, J, or M nonimmigrant also may fail to maintain his or her status if the alien remains in the United States after having completed the course of study or program (including any authorized practical training plus authorized grace period, as outlined in 8 CFR 214.2). Additionally, an F, J, or M nonimmigrant who is admitted for a date certain on his or her Form I-94, Arrival/Departure Record and remains in the United States beyond that date may fail to maintain his or her status. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer generally will give the alien an opportunity to rebut that derogatory information.

[21] An F, J, or M nonimmigrant who failed to maintain status before the effective date of this memorandum and remains in the United States without maintaining lawful status is generally present in violation of U.S. immigration

- The day after DHS denied the request for the immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;[22]

- The day after the Form I-94, Arrival/Departure Record expired, if the F, J, or M nonimmigrant was admitted for a date certain; or

- The day after an immigration judge ordered the alien excluded, deported, or removed (whether or not the decision is appealed).

F, J, or M nonimmigrants who failed to maintain nonimmigrant status on or after August 9, 2018

An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status[23] **on or after** August 9, 2018, on the earliest of any of the following:

- The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;

- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2);

- The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or

- The day after an immigration judge orders the alien excluded, deported, or removed (whether or not the decision is appealed).

Foreign students (F nonimmigrant) generally do not accrue unlawful presence in certain situations, including but not limited to:

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laws. Nevertheless, if DHS makes the inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) on or after August 9, 2018, unlawful presence for such an alien begins accruing on August 9, 2018 and may continue to accrue for as long as the alien remains in unlawful status in the United States, unless the alien is or becomes otherwise protected from accruing unlawful presence, as outlined in this AFM Chapter 40.9.2.

[22] Note that the policy for determining when unlawful presence begins to accrue remains unchanged for F, J, and M nonimmigrants for whom DHS made a formal finding of violation of nonimmigrant status before August 9, 2018.

[23] The day the alien failed to maintain his or her status may be determined by a DHS officer. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer shall give the alien an opportunity to rebut that derogatory information.

- During the period permitted under 8 CFR 214.2(f)(5)(i) (period of up to 30 days before the program start date listed on the F-1 nonimmigrant's Form I-20);

- While the F-1 nonimmigrant is pursuing a full course of study at an educational institution approved by DHS for attendance by foreign students, and any additional periods of authorized pre- or post-completion practical training, including authorized periods of unemployment under 8 CFR 214.2(f)(10)(ii)(E);

- During a change in educational levels as outlined in 8 CFR 214.2(f)(5)(ii), provided the F-1 nonimmigrant transitions to the new educational level according to transfer procedures outlined in 8 CFR 214.2(f)(8);

- While the F-1 nonimmigrant is in a cap gap period under 8 CFR 214.2(f)(5)(vi), that is, during an automatic extension of an F-1 nonimmigrant's D/S and employment authorization as provided under 8 CFR 214.2(f)(5)(vi) for a beneficiary of an H-1B petition and request for a change of status that has been timely filed and states that the employment start date for the F-1 nonimmigrant is October 1 of the following fiscal year;

- While the F-1 nonimmigrant's application for post-completion Optional Practical Training (OPT) remains pending under 8 CFR 214.2(f)(10)(ii)(D);

- While the F-1 nonimmigrant is pursuing a school transfer provided that he or she has maintained status as provided in 8 CFR 214.2(f)(8);

- The period of time a timely-filed[24] reinstatement application under 8 CFR 214.2(f)(16) is pending with USCIS;

- The period of time an F-1 nonimmigrant was out of status if he or she applies for reinstatement under 8 CFR 214.2(f)(16), provided that the application is ultimately approved;

- During annual vacation permitted under 8 CFR 214.2(f)(5)(iii) if the F-1 nonimmigrant is eligible and intends to register for the next term;

- During any additional grace period as permitted under 8 CFR 214.2(f)(5)(iv) to prepare for departure:

    - 60 days following completion of a course of study and any authorized practical training;

[24] For purposes of tolling unlawful presence, a reinstatement application will be considered to be timely-filed if the applicant has not been out of status for more than 5 months at the time of filing the request for reinstatement.

  - 15 days if the designated school official (DSO) authorized the withdrawal from classes (SEVIS termination reason: authorized early withdrawal); or

  - No grace period if the F-1 nonimmigrant failed to maintain a full course of study without the approval of the DSO or otherwise failed to maintain status.

- Emergent circumstances as outlined in 8 CFR 214.2(f)(5)(v), in which any or all of the requirements for on-campus or off-campus employment are suspended by a *Federal Register* notice and the student reduces his or her full course of study as a result of accepting employment based on the *Federal Register* notice; and

- During a period of reduced course load, as authorized by the DSO under 8 CFR 214.2(f)(6)(H)(iii).

Foreign exchange visitors (J nonimmigrants) generally do not accrue unlawful presence in certain situations, including but not limited to:

- The period of time annotated on Form DS-2019 as the approved program time plus any grace period, either before the program start date or after the conclusion of the program as outlined in 8 CFR 214.2(j)(1)(ii);

- Any extension of program time annotated on Form DS-2019 as outlined in 8 CFR 214.2(j)(1)(iv);

- While the J-1 nonimmigrant is in a cap gap period as outlined in 8 CFR 214.2(j)(1)(vi);[25] and

- The period of time a J-1 nonimmigrant was out of status, if he or she is granted reinstatement under 22 CFR 62.45.

Foreign vocational students (M nonimmigrants) generally do not accrue unlawful presence in certain situations, including but not limited to:

- The period of admission as indicated on Form I-94, plus up to 30 days before the report or start date of the course of study listed on the Form I-20 as outlined in 8 CFR 214.2(m)(5);

- Any authorized grace period as outlined in 8 CFR 214.2(m)(5);

[25] This is a discretionary provision in which the USCIS Director may, by notice in the *Federal Register*, bridge the gap for J-1 nonimmigrants.

- During the time the M-1 nonimmigrant completes authorized practical training as outlined in 8 CFR 214.2(m)(14);

- The period of time a timely-filed[26] reinstatement application under 8 CFR 214.2(m)(16) is pending with USCIS; and,

- The period of time an M-1 nonimmigrant was out of status if he or she applies for reinstatement under 8 CFR 214.2(m)(16), provided that the application is ultimately approved.

The period of stay authorized for an F-2, J-2, or M-2 nonimmigrant dependent (spouse or child) admitted for D/S or for a date certain is contingent on the F-1, J-1, or M-1 nonimmigrant remaining in a period of stay authorized. An F-2, J-2, or M-2 nonimmigrant's period of stay authorized ends when the F-1, J-1, or M-1 nonimmigrant's period of stay authorized ends. In addition, an F-2, J-2, or M-2 nonimmigrant's period of stay authorized may end due to the F-2, J-2, or M-2 nonimmigrant dependent's own conduct or circumstances.

An alien under 18 years of age does not accrue unlawful presence.[27] Therefore, any F, J, or M nonimmigrant who is under 18 years of age does not accrue unlawful presence. Additionally, the F, J, or M nonimmigrant may be otherwise protected from accruing unlawful presence, as outlined in this chapter.

(iv) Non-Controlled Nonimmigrants (for example, Canadian B-1/B-2)

Nonimmigrants who are not issued a Form I-94, Arrival/Departure Record, are treated as nonimmigrants admitted for D/S (as addressed in Chapter 40.9.2(b)(1)(E)(ii)) for purposes of determining unlawful presence.

(F) Other Types of Lawful Status

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(2) Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence by Statute for Purposes of Section 212(a)(9)(B) of the Act (Statutory Exceptions)

* * *

(3) Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence by Virtue of USCIS Policy for Purposes of Sections 212(a)(9)(B) and (C)(i)(I) of the Act

[26] For purposes of tolling unlawful presence, a reinstatement application will be considered to be timely-filed if the applicant has not been out of status for more than 5 months at the time of filing the request for reinstatement.
[27] See INA 212(a)(9)(B)(iii)(I).

* * *

(D) Nonimmigrants – Effect of a Decision on the Request for Extension of Status (EOS) or Change of Status (COS) on Unlawful Presence

The following information pertains to applications requesting EOS or COS, or petitions that include requests for EOS or COS.

(i) Approved Requests

* * *

(ii) Denials Based on Frivolous Filings or Unauthorized Employment

If a request for EOS or COS is denied because it was frivolous or because the alien engaged in unauthorized employment, the EOS or COS application does not protect the alien from accruing unlawful presence. The alien accrues unlawful presence as outlined in Chapter 40.9.2(b)(1)(E), Lawful Nonimmigrants.

(iii) Denials of Untimely Applications

If a request for EOS or COS is denied because it was not timely filed, the EOS or COS application does not protect the alien from accruing unlawful presence. The alien accrues unlawful presence as outlined in Chapter 40.9.2(b)(1)(E), Lawful Nonimmigrants.

(iv) Denials for Cause of Timely Filed, Non-Frivolous Applications for EOS or COS

* * *

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

If USCIS officers have questions or suggestions regarding this PM, they should direct them through their appropriate chains of command to the Office of Policy and Strategy.

Exhibit B

FOR PUBLIC COMMENT
Posted: 05-11-2018
Comment period ends: 06-11-2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

May 10, 2018

PM-602-1060

Policy Memorandum

SUBJECT: Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Purpose

This Policy Memorandum (PM) provides guidance to U.S. Citizenship and Immigration Services (USCIS) officers and assists USCIS officers in the calculation of unlawful presence of those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States. The PM also revises previous policy guidance in the USCIS Adjudicator's Field Manual (AFM) relating to this issue.

Authority

- INA 212(a)(9)(B)
- INA 212(a)(9)(C)

Background

Since the creation of the U.S. Department of Homeland Security (DHS), USCIS has followed the former Immigration and Naturalization Service's (INS) various policies on the accrual of unlawful presence. In 2009, USCIS consolidated its prior policy guidance in AFM Chapter 40.9.2.[1]

According to that policy—to be superseded by this policy memorandum—foreign students and exchange visitors (F and J nonimmigrants, respectively) who were admitted for, or present in the United States in, duration of status (D/S) started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision is appealed), whichever came first. F and J nonimmigrants, and foreign vocational students (M nonimmigrants), who were admitted until a specific date (date certain) accrued unlawful presence on the day after their Form I-94 expired, on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit, or on the day after an immigration judge ordered the

[1] See USCIS Interoffice Memorandum, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act" (May 6, 2009).

applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came first.[2]

The former INS policy, as consolidated in the AFM, went into effect in 1997, prior to the creation of some of the technologies and systems currently used by DHS to monitor nonimmigrants who are admitted to the United States in or otherwise acquire F, J, or M nonimmigrant status. Over the years, DHS also has made significant progress in its ability to identify and calculate the number of nonimmigrants who have failed to maintain status, including certain F, J, and M nonimmigrants.[3]

For example, since the creation of the policy, the Student and Exchange Visitor Information System (SEVIS)—the DHS system used to monitor F, J, and M nonimmigrants—has provided USCIS officers additional information about an alien's immigration history, including information that indicates that an alien in F, J, or M nonimmigrant status may have completed or ceased to pursue his or her course of study or activity, as outlined in Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, and related forms, or Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status. For FY 2016, DHS calculated that a total of 1,457,556 aliens admitted in F, J, and M nonimmigrant status were either expected to change status or depart the United States. Of this population, it was estimated that the total overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants.[4]

To reduce the number of overstays and to improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I), USCIS is now changing its policy on how to calculate unlawful presence for F-1, J-1, and M-1 nonimmigrants, and their dependents (F-2, J-2, and M-2).

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[2] Under the former policy, an alien admitted for duration of status who overstayed or violated such status did not immediately begin accruing a period of unlawful presence for purposes of INA 212(a)(9)(B). Nevertheless, such alien was illegally present in the United States and would be amenable to removal proceedings under INA 237(a)(1)(C), which renders deportable aliens who violate their nonimmigrant status or any condition of their entry. Moreover, such aliens could be charged and ultimately convicted of any criminal offense requiring the alien to be illegally or unlawfully present in the United States as an element of the offense. For example, aliens who were admitted for duration of status and either violated or overstayed such status were treated as being illegally or unlawfully present in the United States for purposes of criminal culpability under the firearms provisions at 18 U.S.C. §§ 922(a)(6) and 922(g)(5). See *United States v. Rehaif*, --- F.3d ----, 2018 WL 1465527 (11th Cir. Mar. 26, 2018) (holding that a student who was academically dismissed, failed to depart the United States immediately, and therefore violated the terms of his F-1 status was unlawfully present for purposes of 18 U.S.C. § 922(g)(5)(A)); *United States v. Atandi*, 376 F.3d 1186, 1188 (10th Cir. 2004) ("Rather, we hold that an alien who is only permitted to remain in the United States for the duration of his or her status (as a student, for example) becomes 'illegally or unlawfully in the United States' for purposes of § 922(g)(5)(A) upon commission of a status violation."); *United States v. Bazargan*, 992 F.2d 844, 847 (8th Cir. 1993) ("A nonimmigrant alien F-1 student becomes an illegal alien subject to deportation by failing to comply with the transfer procedures set forth in the INS regulations."); *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985) (per curiam) ("After failing to maintain the student status required by his visa, Igbatayo was without authorization to remain in this country.").

[3] See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, *available at* https://www.dhs.gov/publication/entryexit-overstay-report.

[4] See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, page 12, *available at* https://www.dhs.gov/publication/entryexit-overstay-report.

Effective Date

This new guidance on the accrual of unlawful presence with respect to F, J and M nonimmigrants will take effect on August 9, 2018. The policy for determining unlawful presence for aliens present in the United States who are not in F, J, or M nonimmigrant status remains unchanged.

This guidance supersedes any prior guidance on this topic.

Policy

The new policy clarifies that F, J and M nonimmigrants, and their dependents, admitted or otherwise authorized to be present in the United States in duration of status (D/S) or admitted until a specific date (date certain), start accruing unlawful presence as outlined below.[5]

F, J, or M nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018.

F, J, or M nonimmigrants who failed to maintain their nonimmigrant status[6] before August 9, 2018 start accruing unlawful presence based on that failure on August 9, 2018,[7] unless the alien had already started accruing unlawful presence on the earliest of the following:

- The day after DHS denied the request for an immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;[8]

[5] Unless the nonimmigrant is otherwise protected from accruing unlawful presence, as outlined in AFM Chapter 40.9.2.
[6] The day the alien failed to maintain status may be determined by a DHS officer. For example, an F, J, or M nonimmigrant may fail to maintain status if he or she no longer is pursuing the course of study or the authorized activity before completing his or her course of study or program, or engages in an unauthorized activity. An F, J, or M nonimmigrant also may fail to maintain his or her status if the alien remains in the United States after having completed the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2). Additionally, an F, J, or M nonimmigrant who is admitted for a date certain on his or her Form I-94, Arrival/Departure Record and remains in the United States beyond that date may fail to maintain his or her status. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I), and that determination is based on derogatory information of which the alien is unaware, the officer generally will give the alien an opportunity to rebut that derogatory information.
[7] An F, J or M nonimmigrant who failed to maintain status before the effective date of this memorandum and remains in the United States without maintaining lawful status is generally present in violation of U.S. immigration laws. Nevertheless, if DHS makes the inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) on or after August 9, 2018, unlawful presence for such an alien begins accruing on August 9, 2018 and may continue to accrue for as long as the alien remains in unlawful status in the United States, unless the alien is or becomes otherwise protected from accruing unlawful presence, as outlined in this AFM Chapter 40.9.2.
[8] Note that the policy for determining when unlawful presence begins to accrue remains unchanged for F, J, and M nonimmigrants for whom DHS made a formal finding of violation of nonimmigrant status before August 9, 2018.

- The day after the Form I-94, Arrival/Departure Record, expired, if the F, J, or M nonimmigrant was admitted for a date certain; or

- The day after an immigration judge or, in certain cases, the Board of Immigration Appeals (BIA),[9] ordered the alien excluded, deported, or removed (whether or not the decision is appealed).

F, J, or M nonimmigrants who failed to maintain nonimmigrant status on or August 9, 2018

An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status[10] **on or after** August 9, 2018, on the earliest of any of the following:

- The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;

- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2);

- The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or

- The day after an immigration judge or, in certain cases, the BIA[11] orders the alien excluded, deported, or removed (whether or not the decision is appealed).

When assessing whether an F, J, or M nonimmigrant accrued unlawful presence and was no longer in a period of stay authorized, the USCIS officer should consider information relating to the alien's immigration history, including but not limited to:

- Information contained in the systems available to USCIS;

- Information contained in the alien's record;[12] and

[9] There may be circumstances in which the BIA issues the removal order because the immigration judge did not order the alien removed. For example, if the immigration judge grants relief to the alien, and U.S. Immigration and Customs Enforcement (ICE) successfully appeals to the BIA, then the alien begins to accrue unlawful presence the day after the BIA issues the removal order.
[10] The day the alien failed to maintain his or her status may be determined by a DHS officer. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer, shall give the alien an opportunity to rebut that derogatory information.
[11] There may be circumstances in which the BIA issues the removal order because the immigration judge did not order the alien removed. For example, if the immigration judge grants relief to the alien, and ICE successfully appeals to the BIA, then the alien begins to accrue unlawful presence the day after the BIA issues the removal order.
[12] This includes the alien's admissions regarding his or her immigration history or other information discovered during the adjudication.

- Information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), if any. The officer should follow current USCIS guidance on the issuance of RFEs or NOIDs.[13]

The period of stay authorized for an F-2, J-2, or M-2 nonimmigrant dependent (spouse or child) admitted for D/S or for a date certain is contingent on the F-1, J-1, or M-1 nonimmigrant remaining in a period of stay authorized. An F-2, J-2, or M-2 nonimmigrant's period of stay authorized ends when the F-1, J-1, or M-1 nonimmigrant's period of stay authorized ends. In addition, an F-2, J-2, or M-2 nonimmigrant's period of stay authorized may end due to the F-2, J-2, or M-2 nonimmigrant dependent's own conduct or circumstances.

This new guidance on the accrual of unlawful presence with respect to F, J and M nonimmigrants will take effect on August 9, 2018. The policy for determining unlawful presence for aliens present in the United States who are not in F, J, or M nonimmigrant status remains unchanged.

This guidance supersedes any prior guidance on this topic.

Implementation

Chapter 40.9.2 of the AFM is revised by:

- Adding "Other than F, J, or M Nonimmigrants" to the heading of section 40.9.2(b)(1)(E)(i);
- Adding "Other Than F or J Nonimmigrants" to the heading of section 40.9.2(b)(1)(E)(ii);
- Creating a new section 40.9.2(b)(1)(E)(iii);
- Redesignating current section 40.9.2(b)(1)(E)(iii) as section 40.9.2(b)(1)(E)(iv) and amending the text; and
- Revising the text of section 40.9.2(b)(3)(D).

These revised AFM Chapter 40.9.2 sections, as amended, read as follows:

* * *

(b) Determining When an Alien Accrues Unlawful Presence

* * *

(1) Aliens Present in Lawful Status or as Parolees

[13] The USCIS assessment is made under the preponderance of the evidence standard. See *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

* * *

(E) Lawful Nonimmigrants

The period of stay authorized for a nonimmigrant may end on a specific date or may continue for "duration of status (D/S)." Under current USCIS policy, nonimmigrants begin to accrue unlawful presence as follows:

(i) Nonimmigrants Admitted Until a Specific Date (Date Certain) Other Than F, J, or M Nonimmigrants

* * *

(ii) Nonimmigrants Admitted for Duration of Status (D/S) Other Than F or J Nonimmigrants

* * *

(iii) F or J Nonimmigrants Admitted for Duration of Status (D/S) or F, J, or M Nonimmigrants Admitted Until a Specific Date (Date Certain)

Background

Since the creation of the U.S. Department of Homeland Security (DHS), USCIS has followed the former Immigration and Naturalization Service's (INS) various policies on the accrual of unlawful presence. In 2009, USCIS consolidated its prior policy guidance in this AFM chapter.[14]
According to that policy—now superseded by this guidance—foreign students and exchange visitors (F and J nonimmigrants, respectively) admitted for, or present in the United States in, duration of status (D/S) started accruing unlawful presence on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration benefit or on the day after an immigration judge ordered the applicant excluded, deported, or removed (whether or not the decision is appealed), whichever came first.[15] F and J nonimmigrants, and foreign vocational students (M nonimmigrants), admitted until a specific date (date certain) accrued unlawful presence on the day after their Form I-94 expired, or on the day after USCIS formally found a nonimmigrant status violation while adjudicating a request for another immigration

[14] See USCIS Interoffice Memorandum, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act" (May 6, 2009).
[15] There may be circumstances in which the BIA issues the removal order because the immigration judge did not order the alien removed. For example, if the immigration judge grants relief to the alien, and ICE successfully appeals to the BIA, then the alien begins to accrue unlawful presence the day after the BIA issues the removal order.

benefit, or on the day after an immigration judge[16] ordered the applicant excluded, deported, or removed (whether or not the decision was appealed), whichever came first. [17]

The former INS policy, as consolidated in the AFM, went into effect in 1997 prior to the creation of some of the technologies and systems currently used by DHS to monitor nonimmigrants who are admitted to the United States in or otherwise acquire F, J, or M nonimmigrant status. Over the years, DHS has also made significant progress in its ability to identify and calculate the number of nonimmigrants who have failed to maintain status, including certain F, J, or M nonimmigrants.[18]

For example, since the creation of the policy, the Student and Exchange Visitor Information System (SEVIS)—the DHS system used to monitor F, J, and M nonimmigrants—has provided USCIS officers additional information about an alien's immigration history, including information that indicates that an alien in F, J, or M nonimmigrant status may have completed or ceased to pursue his or her course of study or activity, as outlined in Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, and related forms, or Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status. For FY 2016, DHS calculated that a total of 1,457,556 aliens admitted in F, J, and M nonimmigrant status were either expected to change status or depart the United States. Of this population, it was estimated that the total overstay rate was 6.19 percent for F nonimmigrants, 3.80 percent for J nonimmigrants, and 11.60 percent for M nonimmigrants.[19]

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[16] There may be circumstances in which the BIA issues the removal order because the immigration judge did not order the alien removed. For example, if the immigration judge grants relief to the alien, and ICE successfully appeals to the BIA, then the alien begins to accrue unlawful presence the day after the BIA issues the removal order.

[17] Under the former policy, an alien admitted for duration of status who overstayed or violated such status did not immediately begin accruing unlawful presence for purposes of INA 212(a)(9)(B). Nevertheless, such alien was illegally present in the United States and would be amenable to removal proceedings under INA 237(a)(1)(C), which renders deportable aliens who violate their nonimmigrant status or any condition of their entry. Moreover, such aliens could be charged and ultimately convicted of any criminal offense requiring the alien to be illegally or unlawfully present in the United States as an element of the offense. For example, aliens who were admitted for duration of status and either violated or overstayed such status were treated as being illegally or unlawfully present in the United States for purposes of criminal culpability under the firearms provisions at 18 U.S.C. §§ 922(a)(6) and 922(g)(5). *See United States v. Rehaif*, --- F.3d ----, 2018 WL 1465527 (11th Cir. Mar. 26, 2018) (holding that a student who was academically dismissed, failed to depart the United States immediately, and therefore violated the terms of his F-1 status was unlawfully present for purposes of 18 U.S.C. § 922(g)(5)(A)); *United States v. Atandi*, 376 F.3d 1186, 1188 (10th Cir. 2004) ("Rather, we hold that an alien who is only permitted to remain in the United States for the duration of his or her status (as a student, for example) becomes 'illegally or unlawfully in the United States' for purposes of § 922(g)(5)(A) upon commission of a status violation."); *United States v. Bazargan*, 992 F.2d 844, 847 (8th Cir. 1993) ("A nonimmigrant alien F-1 student becomes an illegal alien subject to deportation by failing to comply with the transfer procedures set forth in the INS regulations."); *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985) (per curiam) ("After failing to maintain the student status required by his visa, Igbatayo was without authorization to remain in this country.").

[18] See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, available at https://www.dhs.gov/publication/entryexit-overstay-report.

[19] See Fiscal Year 2016 Entry/Exit Overstay Report, Department of Homeland Security, page 12, available at https://www.dhs.gov/publication/entryexit-overstay-report.

To reduce the number of overstays and to improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I), USCIS changed its policy on how to calculate unlawful presence for F-1, J-1, and M-1 nonimmigrants, and their dependents (F-2, J-2, and M-2) effective on August 9, 2018.

Policy

Foreign students (F-1 nonimmigrants), exchange visitors (J-1 nonimmigrants), and vocational students (M-1 nonimmigrants), and their dependents, admitted or otherwise authorized to be present in the United States in duration of status (D/S) or admitted until a specific date (date certain) (in accordance with 8 CFR 214.2(f), 8 CFR 214.2(j) or 8 CFR 214.2(m)) start accruing unlawful presence as outlined below.[20]

When assessing whether an F, J, or M nonimmigrant accrued unlawful presence and was no longer in a period of stay authorized, the USCIS officer should consider information relating to the alien's immigration history, including but not limited to:

- Information contained in the systems available to USCIS;
- Information contained in the alien's record;[21] and
- Information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), if any. The officer should follow current USCIS guidance on the issuance of RFEs or NOIDs.[22]

F, J or M nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018

F, J, or M nonimmigrants who failed to maintain their nonimmigrant status[23] before August 9, 2018

[20] Unless the nonimmigrant is otherwise protected from accruing unlawful presence, as outlined in AFM Chapter 40.9.2.
[21] This includes the alien's admissions regarding his or her immigration history or other information discovered during the adjudication.
[22] The assessment is made under the preponderance of the evidence standard. See *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).
[23] The day the alien failed to maintain status may be determined by a DHS officer. For example, an F, J, or M nonimmigrant may fail to maintain status if he or she no longer is pursuing the course of study or the authorized activity before completing his or her course of study or program, or engages in unauthorized activity. An F, J, or M nonimmigrant also may fail to maintain his or her status if the alien remains in the United States after having completed the course of study or program (including any authorized practical training plus authorized grace period, as outlined in 8 CFR 214.2). Additionally, an F, J, or M nonimmigrant who is admitted for a date certain on his or her Form I-94, Arrival/Departure Record and remains in the United States beyond that date may fail to maintain his or her status. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on

start accruing unlawful presence based on that failure on August 9, 2018**,** [24] unless the alien had already started accruing unlawful presence on the earliest of the following:

- The day after DHS denied the request for the immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;[25]

- The day after the Form I-94, Arrival/Departure Record expired, if the F, J, or M nonimmigrant was admitted for a date certain; or

- The day after an immigration judge or, in certain cases, the Board of Immigration Appeals (BIA)[26] ordered the alien excluded, deported, or removed (whether or not the decision is appealed).

F, J, or M nonimmigrants who failed to maintain nonimmigrant status on or after August 9, 2018

An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status[27] **on or after** August 9, 2018, on the earliest of any of the following:

- The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;

- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2);

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derogatory information of which the alien is unaware, the officer generally will give the alien an opportunity to rebut that derogatory information.

[24] An F, J, or M nonimmigrant who failed to maintain status before the effective date of this memorandum and remains in the United States without maintaining lawful status is generally present in violation of U.S. immigration laws. Nevertheless, if DHS makes the inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) on or after August 9, 2018, unlawful presence for such an alien begins accruing on August 9, 2018 and may continue to accrue for as long as the alien remains in unlawful status in the United States, unless the alien is or becomes otherwise protected from accruing unlawful presence, as outlined in this AFM Chapter 40.9.2.

[25] Note that the policy for determining when unlawful presence begins to accrue remains unchanged for F, J, and M nonimmigrants for whom DHS made a formal finding of violation of nonimmigrant status before August 9, 2018.

[26] There may be circumstances in which the BIA issues the removal order because the immigration judge did not order the alien removed. For example, if the immigration judge grants relief to the alien, and U.S. Immigration and Customs Enforcement (ICE) successfully appeals to the BIA, then the alien begins to accrue unlawful presence the day after the BIA issues the removal order.

[27] The day the alien failed to maintain his or her status may be determined by a DHS officer. In accordance with 8 CFR 103.2(b)(16), if an adverse decision will result from a DHS officer's inadmissibility determination under INA 212(a)(9)(B) or INA 212(a)(9)(C)(i)(I) and that determination is based on derogatory information of which the alien is unaware, the officer shall give the alien an opportunity to rebut that derogatory information.

- The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or

- The day after an immigration judge or, in certain cases the BIA[28] orders the alien excluded, deported, or removed (whether or not the decision is appealed).

Foreign students (F nonimmigrant) generally do not accrue unlawful presence in certain situations, including but are not limited to:

- During the period permitted under 8 CFR 214.2(f)(5)(i) (period of up to 30 days before the program start date listed on the F-1 nonimmigrant's Form I-20);

- While the F-1 nonimmigrant is pursuing a full course of study at an educational institution approved by DHS for attendance by foreign students, and any additional periods of authorized pre- or post-completion practical training, including authorized periods of unemployment under 8 CFR 214.2(f)(10)(ii)(E);

- During a change in educational levels as outlined in 8 CFR 214.2(f)(5)(ii), provided the F-1 nonimmigrant transitions to the new educational level according to transfer procedures outlined in 8 CFR 214.2(f)(8);

- While the F-1 nonimmigrant is in a cap gap period under 8 CFR 214.2(f)(5)(vi), that is, during an automatic extension of an F-1 nonimmigrant's D/S and employment authorization as provided under 8 CFR 214.2(f)(5)(vi) for a beneficiary of an H-1B petition and request for a change of status that has been timely filed and states that the employment start date for the F-1 nonimmigrant is October 1 of the following fiscal year;

- While the F-1 nonimmigrant's application for post-completion Optional Practical Training (OPT) remains pending under 8 CFR 214.2(f)(10)(ii)(D);
- While the F-1 nonimmigrant is pursuing a school transfer provided that he or she has maintained status as provided in 8 CFR 214.2(f)(8);

- The period of time an F-1 nonimmigrant was out of status if he or she applies for reinstatement under 8 CFR 214.2(f)(16), provided that the application is ultimately approved;[29]

[28] There may be circumstances in which the BIA issues the removal order because the immigration judge did not order the alien removed. For example, if the immigration judge grants relief to the alien, and ICE successfully appeals to the BIA, then the alien begins to accrue unlawful presence the day after the BIA issues the removal order.
[29] Filing a reinstatement request does not by itself place the alien into a period of stay authorized and, therefore, does not stop the alien from accruing unlawful presence. If the request is ultimately denied, the F-1 nonimmigrant began to accrue unlawful presence (and is not in a period of stay authorized) the day after the alien stopped pursuing the course of study or authorized activity, unless he or she is otherwise protected from accruing unlawful presence. If

- During annual vacation permitted under 8 CFR 214.2(f)(5)(iii) if the F-1 nonimmigrant is eligible and intends to register for the next term;

- During any additional grace period as permitted under 8 CFR 214.2(f)(5)(iv) to prepare for departure:

    - 60 days following completion of a course of study and any authorized practical training;

    - 15 days if the designated school official (DSO) authorized the withdrawal from classes (SEVIS termination reason: authorized early withdrawal); or

    - No grace period if the F-1 nonimmigrant failed to maintain a full course of study without the approval of the DSO or otherwise failed to maintain status).

- Emergent circumstances as outlined in 8 CFR 214.2(f)(5)(v), in which any or all of the requirements for on-campus or off-campus employment are suspended by a Federal Register notice and the student reduces his or her full course of study as a result of accepting employment based on the *Federal Register* notice; and

- During a period of reduced course load, as authorized by the DSO under 8 CFR 214.2(f)(6)(H)(iii).

Foreign exchange visitors (J nonimmigrants) generally do not accrue unlawful presence in certain situations, including but not limited to:

- The period of time annotated on Form DS-2019 as the approved program time plus any grace period, either before the program start date or after the conclusion of the program as outlined in 8 CFR 214.2(j)(1)(ii);

- Any extension of program time annotated on Form DS-2019 as outlined in 8 CFR 214.2(j)(1)(iv); and

- While the J-1 nonimmigrant is in a cap gap period as outlined in 8 CFR 214.2(j)(1)(vi).[30]

Foreign vocational students (M nonimmigrants) generally do not accrue unlawful presence in certain situations, including but not limited to:

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the reinstatement application is approved, however, no unlawful presence generally will have accrued during the time period in which the student was out of status.

[30] This is a discretionary provision in which the USCIS Director may, by notice in the *Federal Register*, bridge the gap for J-1 nonimmigrants.

- The period of admission as indicated on Form I-94, plus up to 30 days before the report or start date of the course of study listed on the Form I-20 as outlined in 8 CFR 214.2(m)(5);

- Any authorized grace period as outlined in 8 CFR 214.2(m)(5); and

- During the time the M-1 nonimmigrant completes authorized practical training as outlined in 8 CFR 214.2(m)(14).

The period of stay authorized for an F-2, J-2, or M-2 nonimmigrant dependent (spouse or child) admitted for D/S or for a date certain is contingent on the F-1, J-1, or M-1 nonimmigrant remaining in a period of stay authorized. An F-2, J-2, or M-2 nonimmigrant's period of stay authorized ends when the F-1, J-1, or M-1 nonimmigrant's period of stay authorized ends. In addition, an F-2, J-2, or M-2 nonimmigrant's period of stay authorized may end due to the F-2, J-2, or M-2 nonimmigrant dependent's own conduct or circumstances.

An alien under 18 years of age does not accrue unlawful presence.[31] Therefore, any F, J, or M nonimmigrant who is under 18 years of age does not accrue unlawful presence. Additionally, the F, J, or M nonimmigrant may be otherwise protected from accruing of unlawful presence, as outlined in this chapter.

(iv) Non-Controlled Nonimmigrants (for example, Canadian B-1/B-2)

Nonimmigrants who are not issued a Form I-94, Arrival/Departure Record, are treated as nonimmigrants admitted for D/S (as addressed in Chapter 40.9.2(b)(1)(E)(ii)) for purposes of determining unlawful presence.

(F) Other Types of Lawful Status

* * *

(2) Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence by Statute for Purposes of Section 212(a)(9)(B) of the Act (Statutory Exceptions)

* * *

(3) Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence by Virtue of USCIS Policy for Purposes of Sections 212(a)(9)(B) and (C)(i)(I) of the Act

* * *

[31] See INA 212(a)(9)(B)(iii)(I).

(D) Nonimmigrants – Effect of a Decision on the Request for Extension of Status (EOS) or Change of Status (COS) on Unlawful Presence

The following information pertains to applications requesting EOS or COS, or petitions that include requests for EOS or COS.

(i) Approved Requests

* * *

(ii) Denials Based on Frivolous Filings or Unauthorized Employment

If a request for EOS or COS is denied because it was frivolous or because the alien engaged in unauthorized employment, the EOS or COS application does not protect the alien from accruing unlawful presence. The alien accrues unlawful presence as outlined in Chapter 40.9.2(b)(1)(E), Lawful Nonimmigrants.

(iii) Denials of Untimely Applications

If a request for EOS or COS is denied because it was not timely filed, the EOS or COS application does not protect the alien from accruing unlawful presence. The alien accrues unlawful presence as outlined in Chapter 40.9.2(b)(1)(E), Lawful Nonimmigrants.

(iv) Denials for Cause of Timely Filed, Non-Frivolous Applications for EOS or COS

* * *

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

If USCIS officers have questions or suggestions regarding this PM, they should direct them through their appropriate chains of command to the Office of Policy and Strategy.

Exhibit C

U.S. Department of Homeland Security
20 Massachusetts Ave., NW
Washington, DC 20529

U.S. Citizenship and Immigration Services

Interoffice Memorandum

To: Field Leadership

From: Donald Neufeld /s/
Acting Associate Director
Domestic Operations Directorate

From: Lori Scialabba /s/
Associate Director
Refugee, Asylum and International Operations Directorate

From: Pearl Chang /s/
Acting Chief
Office of Policy and Strategy

Date: May 6, 2009

Re: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act

Revision to and Re-designation of *Adjudicator's Field Manual* (*AFM*) Chapter 30.1(d) as Chapter 40.9 (*AFM* Update AD 08-03)

1. Purpose

Chapter 30.1(d) of the *Adjudicator's Field Manual* consolidates USCIS guidance to adjudicators for determining when an alien accrues unlawful presence, for purposes of inadmissibility under section 212(a)(9)(B) or (C) of the Immigration and Nationality Act. This memorandum re-designates Chapter 30.1(d) of the *AFM* as chapter 40.9 of the *AFM*. This memorandum also revises newly re-designated Chapter 40.9 to clarify the available guidance, and to incorporate into Chapter 40.9 prior guidance that was issued after adoption of former Chapter 30.1(d) but not incorporated into former Chapter 30.1(d).

USCIS intends *AFM* Chapter 40.9 to provide comprehensive guidance to adjudicators concerning the accrual of unlawful presence and the resulting inadmissibility. Since Chapter 40.9 provides comprehensive guidance, the following prior memoranda are rescinded in their entirety:

Date	Subject
September 19, 1997	Section 212(a)(9)(B) Relating to Unlawful Presence
March 3, 2000	Period of stay authorized by the Attorney General after 120-day tolling period for purposes of section 212(a)(9)(B) of the Immigration and Nationality Act (the Act) (AD 00-07)
June 12, 2002	Unlawful Presence
April 2, 2003	Guidance on Interpretation of "Period of Stay Authorized by the Attorney General" in Determining "Unlawful Presence" under Section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (Act)

Also, the following memoranda are rescinded, insofar as they dealt with inadmissibility under section 212(a)(9)(B) or (C) of the Act.

Date	Subject
March 31, 1997	Implementation of section 212(a)(6)(A) and 212(9) grounds of Inadmissibility
June 17, 1997	Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)

Also rescinded is any other USCIS memorandum (or legacy INS memorandum) that addresses inadmissibility under section 212(a)(9)(B) or (C) of the Act, to the extent that any other such memorandum is inconsistent with *AFM* Chapter 40.9.

2. Background

The three- and ten-year bars to admissibility of section 212(a)(9)(B)(i) of the Act and the permanent bar to admissibility of section 212(a)(9)(C)(i)(I) of the Act were added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Div. C of PL 104-208 (September 30, 1996)) (IIRIRA). The amendments enacting sections 212(a)(9)(B) and (C) became effective on April 1, 1997.

Section 212(a)(9)(B)(i)(I) of the Act renders inadmissible those aliens who were unlawfully present for more than 180 days but less than one (1) year, who voluntarily departed the United States prior to the initiation of removal proceedings and who seek admission within three (3) years of the date of such departure or removal from the United States. Section 212(a)(9)(B)(i)(II) of the Act renders inadmissible those aliens unlawfully present for one (1) year or more, and who seek admission within ten (10) years of the date of the alien's departure or removal from the United States. Finally, section 212(a)(9)(C)(i)(I) of the Act renders inadmissible any alien who

has been unlawfully present in the United States for an aggregate period of more than one (1) year, and who enters or attempts to reenter the United States without being admitted.

Section 212(a)(9)(B)(ii) of the Act specifies that "unlawful presence" can accrue during any period in which an alien, other than a Legal Permanent Resident, is present in the United States without having been admitted or paroled, or after the expiration of the period of stay authorized by the Secretary of Homeland Security. As discussed in *AFM* Chapter 40.9.2, there are other situations in which an alien who is actually in an unlawful immigration status is, nevertheless, protected from the accrual of unlawful presence.

Over the last ten (10) years, the determination of what constitutes "unlawful presence" has been the subject of various interpretations, in part because of legislation amending the rights of aliens seeking immigration benefits. Legacy Immigration and Naturalization Service (INS) and the United States Citizenship and Immigration Services (USCIS) have issued several memoranda on this issue; however, sometimes, the *AFM* was not updated. Therefore, this revised and re-designated section 40.9.2 in the *AFM* consolidates the information contained in these memoranda and updates the *AFM*.

In general, the consequences of accruing unlawful presence depend on the immigration status of an individual, the particular type of benefit or relief sought, and whether the denial of the benefit is subject to administrative and judicial review. The details are set forth in the field guidance below.

3. Field Guidance and *AFM* Update

The adjudicator is directed to comply with the guidance provided in the *AFM* as amended by this memorandum. Additionally, overseas adjudication officers can also find guidance on this issue, tailored to the overseas context, in the International Operations "Procedures for Adjudication of Form I-601 for Overseas Adjudication Officers" dated July 30, 2008 or subsequent revisions.

The *AFM* is updated as follows:

1. Chapter 30.1(d) of the *AFM* entitled "Unlawful Presence Under Section 212(a)(9) of the Act" is re-designated as Chapter 40.9 and
2. Chapter 40.9 and is amended as follows:

40.9 Aliens Previously Removed and Unlawfully Present (Section 212(a)(9) of the Act)

Section 212(a)(9) of the Act renders certain aliens inadmissible based on prior violations of U.S. immigration law. Section 212(a)(9) of the Act has three major subsections.

Under Section 212(a)(9)(A) of the Act, an alien, who was deported, excluded or removed under any provision of law, is inadmissible if the alien seeks admission to the

United States during the period specified in section 212(a)(9)(A) of the Act, unless the alien obtains consent to reapply for admission during this period.

Under section 212(a)(9)(B) of the Act, an alien is inadmissible if the alien has accrued a specified period of unlawful presence, leaves the United States after accruing the unlawful presence, and then seeks admission during the period specified in section 212(a)(9)(B)(i) (either 3 years or 10 years after the departure, depending on the duration of the accrued unlawful presence).

Under Section 212(a)(9)(C)(i) of the Act, an alien is inadmissible if the alien enters or attempts to enter the United States without admission after having been removed or after having accrued more than one year (in the aggregate) of unlawful presence.

AFM Chapter 40.9.2 provides an overview of USCIS' policy concerning the accrual of unlawful presence and the resulting inadmissibility under section 212(a)(9)(B) or section 212(a)(9)(C)(i)(I) of the Act.

40.9.1 Inadmissibility Based on Prior Removal (Section 212(a)(9)(A) of the Act) or Based on Unlawful Return after Prior Removal (Section 212(a)(9)(C)(i)(II) of the Act)) [Reserved]

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(C) TPS Applicants

(D) Certain Battered Spouses, Parents, and Children

(E) Asylee and Refugee Adjustment Applicants under Section 209(c) of the Act

(a) General Overview

If an alien, other than an alien lawfully admitted for permanent residence, accrues unlawful presence in the United States, he or she may be inadmissible pursuant to section 212(a)(9)(B)(i)(Three-year and Ten-year bars) or 212(a)(9)(C)(i)(I) of the Act (Permanent bar).

(1) **Outline of Section 212(a)(9)(B)(i) and Section 212(a)(9)(C)(i)(I) of the Act**

(A) **Section 212(a)(9)(B)(i) of the Act - The 3-Year and the 10-Year Bars**. Section 212(a)(9)(B)(i) is broken into two (2) sub-groups:

- Section 212(a)(9)(B)(i)(I) of the Act (3-year bar). This provision renders inadmissible for three (3) years those aliens, who were unlawfully present for more than 180 days but less than one (1) year, and who departed from the United States voluntarily prior to the initiation of removal proceedings.
- Section 212(a)(9)(B)(i)(II) of the Act (10-year bar). This provision renders inadmissible an alien, who was unlawfully present for one (1) year or more, and who seeks again admission within ten (10) years of the date of the alien's departure or removal from the United States.

Both bars can be waived pursuant to section 212(a)(9)(B)(v) of the Act.

(B) **Section 212(a)(9)(C)(i)(I) of the Act - The Permanent Bar**. This provision renders an individual inadmissible, if he or she has been unlawfully present in the United States for an aggregate period of more than one (1) year, and who enters or attempts to reenter the United States without being admitted. An alien, who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act is permanently inadmissible; however, after having been outside the United States for at least ten (10) years, he or she may seek consent to reapply for admission pursuant to section 212(a)(9)(C)(ii) of the Act and 8 CFR 212.2. A waiver is also available for certain Violence Against Women Act (VAWA) self-petitioners under section 212(a)(9)(C)(iii) of the Act. The 10-year absence requirement does not apply to a VAWA self-petitioner who is seeking a waiver under section 212(a)(9)(C)(iii) of the Act, rather than seeking consent to reapply under section 212(a)(9)(C)(ii) of the Act.

A DHS regulation at 8 CFR 212.2 addresses the filing and adjudication of an application for consent to reapply (filed on Form I-212). As stated by the Board of Immigration Appeals (BIA) in *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006), however, the consent to reapply regulation at 8 CFR 212.2 predates the enactment of section 212(a)(9)(C) of the Act and the related consent to reapply provision in section 212(a)(9)(A)(iii) of the Act. Thus, although the *filing procedures* in 8 CFR 212.2 are still in effect, the substantive requirements of section 212(a)(9) of the Act govern during the adjudication of Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation and Removal. A USCIS adjudicator must consider the specific requirements of section 212(a)(9)(C)(ii) of the Act when adjudicating Form I-212

that is filed by an alien who is inadmissible under section 212(a)(9)(C)(i) of the Act. That is, because of the 10-year absence requirement for consent to reapply, section 212(a)(9)(C)(i)(I) of the Act is a permanent bar for which neither the retroactive nor the prospective grant of consent to reapply is possible. The regulatory language at 8 CFR 212.2(i) and (j) is not applicable, *see Torres-Garcia*, at 875, and the alien has to be physically outside the United States for a period of at least ten years since his or her last departure before being eligible to be granted consent to reapply. *See id.*, at 876. Finally, the regulatory language referring to the 5-year and the 20-year limitation on consent to reapply does not apply to section 212(a)(9)(C) of the Act; these limitations refer to former sections 212(a)(6)(A) and (B), the predecessors of current section 212(a)(9)(A) of the Act. *See id.* at 874 (for a historical analysis).

Also, an adjudicator should pay special attention to the possibility that an alien who is inadmissible under section 212(a)(9)(C)(i)(II) of the Act (because the alien entered or attempted to enter without admission after having been removed) may be subject to the reinstatement provision of section 241(a)(5) of the Act (reinstatement of removal orders).

(2) **Distinction Between "Unlawful Status" and "Unlawful Presence"**

To understand the operation of sections 212(a)(9)(B) and 212(a)(9)(C)(i)(I) of the Act, it is important to comprehend the difference between being in an unlawful immigration status and the accrual of unlawful presence ("period of stay not authorized"). Although these concepts are related (one must be present in an unlawful status in order to accrue unlawful presence), they are not the same.

As discussed in chapters 40.9.2(b)(2) and (3), there are situations in which an alien who is present in an unlawful status nevertheless does not accrue unlawful presence. As a matter of prosecutorial discretion, DHS may permit an alien who is present in the United States unlawfully, but who has pending an application that stops the accrual of unlawful presence, to remain in the United States while that application is pending. In this sense, the alien's remaining can be said to be "authorized." However, the fact that the alien does not accrue unlawful presence does *not* mean that the alien's presence in the United States is actually lawful.

> **Example 1:** An alien is admitted as a nonimmigrant, with a Form I-94 that expires on January 1, 2009. The alien remains in the United States after the Form I-94 expires. The alien's status becomes unlawful, and she begins to accrue unlawful presence, on January 2, 2009. On May 10, 2009, the alien properly files an application for adjustment of status. The filing of the adjustment application stops the accrual of unlawful presence. But it does not "restore" the alien to a substantively lawful immigration status. She is still amenable to removal as a deportable alien under section 237(a)(1)(C) of the Act because she has remained after the expiration of her nonimmigrant admission.

> **Example 2:** An alien is admitted as a nonimmigrant, with a Form I-94 that expires on January 1, 2009. On October 5, 2008, he properly files an application for adjustment of status. He does not, however, file any application to extend his nonimmigrant stay, which expires on January 1, 2009. The adjustment of status application is still pending on January 2, 2009. On January 2, 2009, he becomes subject to removal as a deportable alien under section 237(a)(1)(C) of the Act because he has remained after the expiration of his nonimmigrant admission. For purposes of future inadmissibility, however, the pending adjustment application protects him from the accrual of unlawful presence.

The application of section 245(k) of the Act is a good example of the importance of clearly distinguishing unlawful *status* from the accrual of unlawful presence. Guidance concerning section 245(k) may be found in chapter 23.5(d) of the *AFM*. If the requirements of section 245(k) are met, this provision relieves certain employment-based immigrants of ineligibility under section 245(c)(2), (c)(7) or (c)(8) of the Act for adjustment of status. For example, an alien who failed to maintain a lawful status after any entry is, ordinarily, ineligible for adjustment of status under section 245(c)(2) of the Act. Departure from the United States and return does, ordinarily, not relieve the alien of this provision. 8 CFR 245.1(d)(3). For an alien who is eligible for the benefit of section 245(k) of the Act, however, only a failure to maintain status since the *last lawful admission* is considered in determining whether the alien is subject to section 245(c)(2), (c)(7) or (c)(8) of the Act. AFM Chapter 23.5(d)(4). Unless the alien, since the last lawful admission failed to maintain lawful status for at least 181 days, section 245(k) of the Act relieves the alien of ineligibility under section 245(c)(2), (c)(7) or (c)(8) of the Act.

As stated in chapters 40.9.2(b)(2) and (3), some aliens who are actually present in an unlawful *status*, are, nevertheless, protected from accruing unlawful presence. But if their unlawful status continues for more than 180 days, in the aggregate, they would be ineligible for the benefit of section 245(k) of the Act, *even if they have accrued no unlawful presence for purposes of section 212(a)(9)(B)* of the Act.

> **Example 3:** An alien is admitted for "duration of status" as an F-1 nonimmigrant student. One year later, the alien drops out of school, and remains in the United States for one year after dropping out. The alien's status became unlawful when she dropped out of school. Neither USCIS nor an IJ ever makes a finding that the alien was out of status; therefore, she never accrues any unlawful presence for purposes of section 212(a)(9)(B) of the Act. Chapter 40.9.2(b)(1)(E)(ii). The alien eventually leaves the United States and returns lawfully as a nonimmigrant. While in nonimmigrant status, a Form I-140 is approved and the alien applies for adjustment of status. Because the alien failed to maintain a lawful status for more than 180 days during her prior sojourn, she is ineligible for adjustment under section 245(c)(2) of the Act, and section 245(k) of the Act does not relieve her of this ineligibility. Under section 245(k) of the Act, the alien is still eligible for adjustment, since the prior failure to maintain status does not apply to make the alien ineligible under section 245(c) of the Act. Also, the alien did not accrue

unlawful *presence* despite the prior unlawful *status,* and so the alien is not inadmissible under section 212(a)(9)(B) of the Act.

Example 4: The alien is admitted as a lawful nonimmigrant, and, while still in status, applies for adjustment of status on the basis of an approved I-140. While the Form I-485 is pending, the alien's EAD expires, and the alien fails to apply for a new EAD. Nevertheless, the alien continues to work after the EAD expires. The period of unauthorized employment exceeds 180 days. The alien would not be inadmissible under section 212(a)(9)(B) of the Act, since the pendency of the I-485 stopped the accrual of unlawful presence. Also, there has been no "departure" to trigger section 212(a)(9)(B) of the Act. Section 245(k) of the Act does not relieve the alien of ineligibility under section 245(c)(2) of the Act since the alien engaged in unauthorized employment for more than 180 days..

An alien who is present in a lawful status will not accrue unlawful presence as long as that lawful status is maintained.

(3) **Definition of Unlawful Presence and Explanation of Related Terms**

(A) **Unlawful Presence**. Section 212(a)(9)(B)(ii) of the Act defines "unlawful presence" for purposes of sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act to mean that an alien is deemed to be unlawfully present in the United States, if the alien is:

- present after the expiration of the period of stay authorized by the Secretary of Homeland Security; or
- present without being admitted or paroled.

(B) **Period of Stay Authorized (Authorized Stay)**. When nonimmigrants are admitted into the United States, the period of stay authorized is generally noted on Form I-94, Admission/Departure Record. Additionally, by policy, USCIS has designated other statuses - including some that are not actually lawful - as "periods of stay authorized." Please see the more detailed analysis in sections (b) and (c), below.

(C) **Admission**. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (Div. C of Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act of 1997, PL 104-208 (September 30, 1996)) amended section 101(a)(13) of the Act by removing the definition of the term "entry," and by replacing it with a definition of the terms "admission" and "admitted." Section 101(a)(13)(A) of the Act now defines "admission" and "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *See* section 101(a)(13)(A) of the Act. Section 101(a)(13)(B) of the Act furthermore clarifies that parole is not admission, and that an alien crewman, who is permitted to land temporarily in the United States, shall not be considered to have been admitted. *See* section 101(a)(13)(B) of the Act.

(D) **Parole**. Parole is the discretionary decision, under section 212(d)(5)(A) of the Act, to permit an inadmissible alien to leave the inspection facility free of official custody, so that, although the alien is not admitted, the alien is permitted to be physically present in the United States. By statutory definition, parole is not admission. *See* section 101(a)(13)(B) of the Act. An alien, who has been paroled under section 212(d)(5)(A) of the Act "[is] still in theory of law at the boundary line and [has] gained no foothold in the United States." *Leng May Ma v. Barber*, 357 U.S. 185, 188-189 (1958), *quoting Kaplan v. Tod*, 267 U.S. 228 (1925).

Parole may be granted on a case-by-case basis for urgent humanitarian reasons (humanitarian parole) or for significant public benefit. *See* section 212(d)(5)(A) of the Act and 8 CFR 212.5. Deferred inspection and advance parole are parole, as are individual port of entry paroles and paroles authorized while a person is overseas. Section 212(a)(9)(B)(ii) of the Act makes clear that an alien, who has been paroled, does not accrue unlawful presence as long as the parole lasts. For purposes of unlawful presence, the reason for the grant of parole is irrelevant. For more information on parole pursuant to section 212(d)(5) of the Act, *see* chapter 54 of the *AFM.*

Only parole under section 212(d)(5)(A) of the Act qualifies as parole for purposes of section 212(a)(9) of the Act. In an April 1999 memorandum and an August 1998 legal opinion (Legal Opinion No. 98-10, August 21, 1998), former INS suggested that a release under section 236 of the Act (conditional parole) could also be considered "parole" for purposes of adjustment of status under the Cuban Adjustment Act. The Board of Immigration Appeals (BIA) has rejected this interpretation in at least one unpublished decision. *See Matter of Ortega-Cervantes,* 2005 WL 649116 (BIA, January 6, 2005). The Ninth Circuit confirmed the BIA's decision and held that release under section 236 of the Act was not "parole" for purposes of adjustment of status. *See Ortega-Cervantes v. Gonzales*, 501 F.3d 1111 (9th Cir. 2007). DHS/Office of the General Counsel reconsidered that aspect of the 1999 memorandum, and the related 1998 legal opinion. On September 28, 2007, it issued a memorandum stating that release under section 236 of the Act is not deemed to be a form of parole under section 212(d)(5) of the Act. *See* September 28, 2007 Memorandum, Office of the General Counsel of the Department of Homeland Security, *Clarification of the Relation Between Release Under Section 236 and Parole Under Section 212(d)(5) of the Immigration and Nationality Act*. As of the release of this *AFM* chapter, the Ninth Circuit is the only circuit that has decided this issue, although several circuits have cases outstanding. If the adjudicator encounters the issue, he or she is advised to inquire with the USCIS Office of the Chief Counsel (Adjudications Law Division) about the status of any pending litigation or further developments.

(4) General Considerations when Counting Unlawful Presence Time Under Sections 212(a)(9)(B) and 212(a)(9)(C)(i)(I) of the Act

(A) **Unlawful Presence for Purposes of the 3-Year and 10-Year Bars Is Not Counted in the Aggregate**. Section 212(a)(9)(B)(i) of the Act only applies to an alien, who has accrued the required amount of unlawful presence during any single stay in the United States; the length of the alien's accrued unlawful presence is not calculated by combining periods of unlawful presence accrued during multiple unlawful stays in the United States. If, during any single stay, an alien has more than one (1) period during which the alien accrues unlawful presence, the length of each period of unlawful presence is added together to determine the total period of unlawful presence time accrued during that single stay.

Reminder: The statutory provisions of the 3-year and the 10-year bars became effective on or after April 1, 1997. An alien, who was unlawfully present in the United States prior to April 1, 1997, started to accrue unlawful presence on April 1, 1997, if he or she remained present in the United States at that time. An alien, who was unlawfully present in the United States prior to April 1, 1997, but departed prior to April 1, 1997, did not accrue any unlawful presence for purposes of section 212(a)(9)(B) of the Act.

Example 1: An alien's status becomes unlawful, and the alien begins to accrue unlawful presence on April 1, 2004. On September 1, 2004 (150 days after April 1, 2004), the alien files an adjustment of status application. The alien does not accrue unlawful presence while the adjustment application is pending. *See* section (b)(3)(A) of this *AFM* chapter. The adjustment application is denied on October 15, 2006 (administratively final decision). After the denial, the alien continues to remain in the United States unlawfully; the accrual of unlawful presence resumes on October 16, 2006, a day after the application is denied. The alien leaves the United States on January 1, 2007. At that time, the individual had accrued unlawful presence from April 1, 2004 to September 1, 2004, and again from October 16, 2006 to January 1, 2007. The total period of unlawful presence time accrued during this single unlawful stay exceeds 180 days. By departing the United States on January 1, 2007, the alien triggered the three-year bar and is inadmissible under section 212(a)(9)(B)(i)(I) of the Act.

Example 2: An alien's status becomes unlawful, and the alien begins to accrue unlawful presence on April 1, 2004. On September 1, 2004, the alien leaves the United States. The alien returns unlawfully on October 15, 2006. He departs the United States again on January 1, 2007. Although the alien has been unlawfully present in the United States for more than 180 days in the aggregate, the unlawful presence was accrued during two (2) separate stays in the United States; during each of these stays, the alien accrued less than 180 days of unlawful presence. Thus, the alien is not inadmissible under section 212(a)(9)(B)(i)(I) of the Act.

(B) **Unlawful Presence for Purposes of the Permanent Bar Is Counted in the Aggregate**. Under section 212(a)(9)(C)(i)(I) of the Act, the alien's unlawful presence is counted in the aggregate, i.e. the total amount of unlawful presence time is determined by adding together all periods of time during which an alien was unlawfully present in the United States on or after April 1, 1997. Therefore, if an alien accrues a total of more than one (1) year of unlawful presence time, whether accrued during a single stay or during multiple stays, departs the United States, and subsequently reenters or attempts to reenter without admission, he or she is subject to the permanent bar of section 212(a)(9)(C)(i)(I) of the Act.

> **Example**: An alien enters the United States unlawfully on April 1, 2004, and leaves on September 1, 2004. The alien has accrued about 150 days of unlawful presence at this time. She reenters the United States unlawfully on January 1, 2005 and stays until November 1, 2005. This time, the alien has accrued 300 days of unlawful presence. Although neither period of unlawful presence exceeds one (1) year, the aggregate period of unlawful presence does exceed one (1) year by totaling 450 days of unlawful presence, which the alien accrued during both stays. If the alien ever returns or attempts to return to the United States without being admitted, he or she will be inadmissible under section 212(a)(9)(C)(i)(I) of the Act.

(C) **Specific Requirements for Inadmissibility under Section 212(a)(9)(B)(i)(I) of the Act (The 3-Year Bar)**. For the three-year bar to apply, the individual must have accrued at least 180 days but less than one (1) year of unlawful presence, and thereafter, must have departed voluntarily prior to the commencement of removal proceedings. Any period of unlawful presence accrued prior to April 1, 1997, does not count for purposes of section 212(a)(9)(B)(i)(I) of the Act.

The alien does not need a formal grant of voluntary departure by DHS for his or her departure to be considered voluntary. However, if DHS grants voluntary departure, the departure is still voluntary because removal proceedings have not yet commenced.

The statutory language of section 212(a)(9)(B)(i)(I) of the Act specifically requires that the alien must have departed the United States prior to the commencement of removal proceedings. Removal proceedings commence with the filing of the Notice to Appear (NTA) with the immigration court following service of the NTA on the alien. *See* 8 CFR 1003.14. An alien, who departs the United States after the NTA has been filed with the immigration court, therefore, is not subject to the three-year bar according to the statutory language. To avoid future inadmissibility, however, the alien must leave before he or she has accrued more than one year of unlawful presence, and becomes inadmissible under section 212(a)(9)(B)(i)(II) of the Act, rather than section 212(a)(9)(A)(i)(I) of the Act. This provision provides the alien with an incentive to end his or her unlawful presence by leaving the United States, rather that contesting removal.

The burden is on the applicant to establish that the NTA had already been filed by the time the applicant had departed. The record of proceedings before the immigration court will generally indicate when the NTA was actually filed, and the filing date shown in the court's record will be controlling.

Even if the applicant is not subject to the three-year or the ten-year bar, there may be other grounds of inadmissibility that apply based on the fact that the removal proceedings were initiated and the alien departed the United States during the proceedings. For example, a conviction that made the alien subject to removal as a deportable alien may also make the alien inadmissible.

(D) **Specific Requirements for Inadmissibility under Section 212(a)(9)(B)(i)(II) of the Act (The 10-Year Bar)**. An alien, who voluntarily departs the United States or who was removed from the United States after having been unlawfully present for more than one (1) year, triggers the 10-year bar to admission under section 212(a)(9)(B)(i)(II) of the Act. Any period of unlawful presence accrued prior to April 1, 1997 does not count for purposes of section 212(a)(9)(B)(i)(II) of the Act.

Unlike the 3-year bar, the 10-year bar applies even if the alien leaves after removal proceedings have commenced; the individual will be inadmissible, even if he or she leaves after the NTA has been filed with the immigration court. Moreover, filing the NTA does not stop the accrual of unlawful presence. 8 CFR 239.3.

(E) **Specific Requirements for Inadmissibility under Section 212(a)(9)(C)(i)(I) of the Act (The Permanent Bar)**

(i) General Requirements. To be permanently inadmissible under section 212(a)(9)(C)(i)(I) of the Act, an alien must have accrued more than one (1) year of unlawful presence in the aggregate, must have left the United States thereafter, and must then have entered or attempted to reenter the United States without being admitted. Any unlawful presence accrued prior to April 1, 1997, or any unlawful entry or attempted reentry into the United States prior to April 1, 1997, does not count for purposes of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act.

(ii) Special Note On the Effect of An Alien's Entry on Parole After Having Accrued More Than One (1) Year Of Unlawful Presence

Is an alien, who had accrued more than one (1) year of unlawful presence, and who is paroled into the United States but not admitted, subject to section 212(a)(9)(C)(i)(I) of the Act?

An alien's inadmissibility under section 212(a)(9)(C)(i)(I) of the Act is fixed at the time of the alien's unlawful entry or attempted reentry.

An alien who had accrued more than one (1) year of unlawful presence, and who has *never* returned or attempted to return without admission after that unlawful presence, and who is paroled into the United States pursuant to section 212(d)(5) of the Act, but not admitted, is not subject to inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. It is the Department of Homeland Security's (DHS) policy that for purposes of section 212(a)(9)(C)(i)(I) inadmissibility, an alien's parole is not deemed to be an "entry or attempted reentry without being admitted," even though parole is not considered admission. *See* section 101(a)(13)(B) and section 212(d)(5)(A) of the Act. This conclusion reflects the legal principle that, although a parolee is actually allowed to physically enter the United States, a parolee is deemed to be at a port of entry, pending a final decision on whether to admit the alien or not. *See Leng May Ma v. Barber*, 357 U.S. 185, 188-189 (1958), *quoting Kaplan v.Tod*, 267 U.S. 228 (1925).

As noted, however, an alien's inadmissibility for returning unlawfully after accruing sufficient unlawful presence is fixed at the time of the alien's unlawful return or attempt to return. Paroling an alien who is already inadmissible does not relieve the alien of inadmissibility. For example, if an alien who is already present in the United States without being admitted because he or she entered without inspection, and who, in the past, had accumulated unlawful presence in excess of one (1) year, is taken into custody, and then later paroled pursuant to section 212(d)(5) of the Act, the alien's parole would not relieve the alien of inadmissibility under section 212(a)(9)(C)(i) of the Act.

For a more detailed explanation and examples, please see (a)(6)(B) of this subsection, below.

(5) **Triggering the Bar by Departing the United States**

An alien must leave the United States after accruing more than 180 days or one (1) year of unlawful presence in order to trigger the 3-year or 10-year bar to admission under section 212(a)(9)(B) of the Act. This includes departures made while traveling after having approved advance parole or with a valid refugee travel document. *See* section (a)(6) of this chapter.

Note: By granting advance parole or a refugee travel document, USCIS does not authorize the alien's departure from the United States; it merely provides a means for the alien to return to the United States, regardless of admissibility. Therefore, even if the alien has an advance parole document, the alien's actual departure from the United States will still trigger the bar to inadmissibility under section 212(a)(9)(B) of the Act.

Section 212(a)(9)(C)(i)(I) of the Act does not explicitly mention "departure" as a prerequisite for the bar to apply. However, according to the wording of the statute, an alien with the requisite period of unlawful presence must "enter or attempt to enter without admission" in order to incur inadmissibility. Thus, the alien cannot violate the provision unless the alien leaves the United States and then returns or attempts to

return. *See Matter of Rodarte-Roman*, 23 I&N Dec. 905 (BIA 2006)(Departure triggers the bars; the IJ erred when denying adjustment of status because of the individual's accrual of unlawful presence in excess of one (1) year without departure.).

(6) **Triggering the 3-Year and the 10-Year Bars But Not the Permanent Bar When Departing with Advance Parole or with a Refugee Travel Document**

(A) **Travel on Advance Parole Issued to Applicants for Adjustment of Status on Form I-512, Authorization For Parole Of An Alien Into The United States, pursuant to 8 CFR 212.5(f) and 8 CFR 245.2(a)(4)**. An alien with a pending adjustment of status application, who has accrued more than 180 days of unlawful presence time, will trigger the bars to admission, if he or she travels outside the United States subsequent to the issuance of an advance parole document. When the alien presents the advance parole document at a port of entry, he or she may be permitted to return to the United States as a parolee because aliens who request parole into the United States are not required to establish admissibility under section 212(a) of the Act. However, the fact that the alien is permitted to return to the United States as a parolee does not confer a waiver of inadmissibility under section 212(a)(9)(B)(i)(I) and (II) of the Act. Consequently, a waiver under section 212(a)(9)(B)(v) of the Act would be required when determining the alien's eligibility to adjust status to lawful permanent residence.

(B) **A Special Note on the Effect on Section 212(a)(9)(C) of the Act of an Alien's Entry on Parole After Having Accrued More Than One (1) Year Of Unlawful Presence**. Parole is not admission. *See* section 101(a)(13)(B) of the Act. An individual is subject to section 212(a)(9)(C)(i)(I) of the Act, if he or she has accrued more than one (1) year of unlawful presence in the United States during a single stay or during multiple stays, who departs, and subsequently enters or attempts to reenter "without being admitted." The statutory language omits the word "parole" and makes it unclear whether an alien, who enters on parole, triggers the bar to inadmissibility under section 212(a)(9)(C) of the Act. Therefore, if an alien is paroled into the United States pursuant to section 212(d)(5)(A) of the Act after having accrued more than one (1) year of unlawful presence, is he or she inadmissible under section 212(a)(9)(C)(i)(I) of the Act because the alien was not "admitted"? The answer is "no" for the following reason:

An alien's inadmissibility pursuant to section 212(a)(9)(C)(i)(I) of the Act is fixed as of the date of the alien's entry or attempted reentry without being admitted. If an alien, who has accrued unlawful presence in excess of one (1) year, came to a port of entry and applied for admission to the United States or asked to be paroled into the United States, the alien will not be deemed to have attempted to enter the United States without "being admitted," if DHS actually paroles the alien. The significant point is that the alien will have arrived at a port of entry and presented himself or herself for inspection. If the alien is paroled, the alien will continue to be considered an applicant for admission, and so cannot be said to have entered or attempted to enter without admission. Thus, if DHS paroles the alien under section 212(d)(5) of the Act, the alien's departure and subsequent return as a parolee does not trigger the section 212(a)(9)(C)(i)(I)-bar for

purposes of a subsequent admissibility determination by DHS (such as at the time of the adjustment of status adjudication). This conclusion reflects the legal principle that, although a parolee is actually allowed to physically enter the United States, a parolee is deemed to be at a port of entry, pending a final decision on whether to admit the alien or not. *See Leng May Ma v. Barber*, 357 U.S. 185, 188-189 (1958), *quoting Kaplan v. Tod*, 267 U.S. 228 (1925).

> **Example**: An alien enters the United States on a B visa. The status expires on January 1, 2000. On January 2, 2000, the individual commences to accrue unlawful presence as having overstayed his or her period of admission The alien applies for adjustment of status on January 1, 2005. The individual is in authorized stay during the pendency of the adjustment of status application and does not accrue unlawful presence. *See* section (b)(3)(A) of this *AFM* chapter. Based on the pending adjustment application, the alien applies for advance parole (Form I-131), which is approved. The alien then leaves the United States on April 1, 2005; at this time, the alien has triggered the 10-year bar to admission to the United States because the alien had accrued unlawful presence in excess of one (1) year (from January 2, 2000, to January 1, 2005). On April 15, 2005, the alien returns to the United States through a port of entry, presents his advance parole document, and is paroled into the United States. The alien will not be considered to have triggered inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. Because the alien is currently a parolee, the alien is deemed to still be at the port of entry. At the time of the adjudication of the adjustment of status application, the alien's request for admission (through the adjustment of status application) will be decided. Thus, the individual is a parolee, he or she is not deemed to have "entered or attempted to reenter without being admitted." (Note: The alien still may be inadmissible under section 212(a)(9)(B) of the Act at the time of the adjustment of status application.)

By contrast, the parole of an alien after the alien had already become inadmissible under section 212(a)(9)(C)(i) would not relieve the alien of inadmissibility under section 212(a)(9)(C)(i) of the Act.

> **Example**: An alien enters the United States on a B visa. The status expires on January 1, 2000. On January 1, 2000, the alien commences to accrue unlawful presence for having overstayed his or her period of admission. The alien applies for adjustment of status on January 1, 2005. The alien departs the United States and returns illegally by crossing the border 30 miles west of the nearest port of entry on April 15, 2005. The alien is now inadmissible under section 212(a)(9)(C)(i)(I) of the Act. (An additional consequence, unrelated to the illegal entry, is that the alien also abandoned his or her adjustment application). Even if the alien were later taken into custody and paroled under section 212(d)(5) of the Act, or were to *later* travel and return on a grant of advance parole, the alien would remain inadmissible under section 212(a)(9)(C)(i)(I) of the Act since the

alien did, in fact, enter without admission after having accrued the requisite period of unlawful presence.

The instructions to Form I-131, Application for Travel Document, and Form I-485, Application to Register Permanent Residence or Adjust Status, as well as the standard Form I-512, Authorization for Parole of an Alien into the United States, include language warning the alien that traveling abroad and returning to the United States by using Form I-512 may make the alien inadmissible under section 212(a)(9)(B) of the Act.

(C) **Travel on a Valid Refugee Travel Document Issued pursuant to Section 208(c)(1)(C) of the Act and 8 CFR 223**. An asylee who had accrued more than 180 days of unlawful presence time prior to having filed the bona fide asylum application, will trigger the bar to admission, if he or she departs the United States while traveling on a valid refugee travel document. When the asylee presents the travel document at a port of entry, he or she can be permitted to reenter the United States to resume status as an asylee; however, the asylee will be inadmissible when he or she applies to adjust status to lawful permanent resident, and a waiver would be required at that time.

(7) **Multiple Grounds of Inadmissibility and the Relationship Between Sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act**

Sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act establish different grounds of inadmissibility based on prior unlawful presence. Whether a specific ground applies to an alien depends on an analysis of the facts of the person's case in light of that specific ground.

It is possible that the alien's immigration history makes the alien inadmissible under *both* section 212(a)(9)(B) of the Act and section 212(a)(9)(C)(i)(I) of the Act.

> **Example**: An alien with more than one (1) year of unlawful presence leaves the United States, thus triggering the 10-year bar to admissibility under section 212(a)(9)(B)(i)(II) of the Act. Three (3) years after the alien's last departure, the alien returns to the United States and enters illegally, thus without having been admitted. The alien is now inadmissible under sections 212(a)(9)(B)(i)(II) and 212(a)(9)(C)(i)(I) of the Act.

Also, an alien with sufficient unlawful presence who is removed from the United States, may be inadmissible under section 212(a)(9)(A), as well as section 212(a)(9)(B)(i)(II) and/or section 212(a)(9)(C)(i) of the Act depending on the circumstances of the individual case.

(8) **Benefits That May Be Available Despite Inadmissibility under Section 212(a)(9)(B)(i)(I), (B)(i)(II), or (C)(i)(I) of the Act**

Section (c) of this chapter specifies forms of relief from inadmissibility under sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act ("Waivers"). Even without a grant of a waiver, aliens who are subject to these grounds of inadmissibility, may still obtain certain benefits as outlined below in (b)(2) and (b)(3), if otherwise eligible.

(A) **Under Section 212(a)(9)(B)(i)(I) or (II) of the Act**. An alien, who is inadmissible under section 212(a)(9)(B)(i) of the Act may apply for and receive, if eligible, a grant of:

- Registry under section 249 of the Act;
- Adjustment of status under section 202 of NACARA;
- Adjustment of status under section 902 of HRIFA;
- Adjustment of status under section 245(h)(2)(A) of the Act;
- Change to V nonimmigrant status under 8 CFR 214.15 (but the alien may need a waiver to obtain adjustment of status to LPR after having acquired V nonimmigrant status);
- LPR status pursuant to the LIFE Legalization Provision: A Legalization applicant under section 1104 of the LIFE Act may travel with authorization during the pendency of the application without triggering inadmissibility under section 212(a)(9)(B) of the Act. *See* 8 CFR 245a.13(e)(5).

(B) **Under Section 212(a)(9)(C)(i)(I) of the Act**. An alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act may apply for and receive, if eligible, a grant of:

- Registry under section 249 of the Act.

(C) **Special Concerns Regarding Section 245(i) - Applications**. The USCIS position is that inadmissibility under section 212(a)(9)(B) or (C) of the Act makes an alien ineligible for adjustment of status under section 245 of the Act, regardless of whether the alien applies under section 245(a) or section 245(i) of the Act. The BIA has endorsed this view. In *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), the Board held that an alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act is not eligible for adjustment under section 245(i) of the Act. An alien who is inadmissible under section 212(a)(9)(B) of the Act is also ineligible for section 245(i) adjustment. *Matter of Lemus*, 24 I&N Dec. 373 (BIA 2007).

USCIS adjudicators will follow *Matter of Briones* and *Matter of Lemus* in all cases, regardless of the decisions of the 9th Circuit in *Acosta v. Gonzales,* 439 F.3d 550 (9th Cir. 2006) or of the 10th Circuit in *Padilla-Caldera v. Gonzales,* 453 F.3d 1237 (10th Cir. 2005). Following these Board cases, rather than *Acosta* and *Padilla-Caldera*, will allow the Board to reexamine the continued validity of these court decisions.

USCIS adjudicators should also be aware that the 9th Circuit has held that the Board's decision in *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006) is entitled to judicial

deference, and that the decision in *Perez-Gonzales v. Ashcroft,* 379 F.3d 783 (9th Cir. 2004), is no longer good law. *Gonzales v. Department of Homeland Security,* 508 F.3d 1227 (9th Cir. 2007).

(9) **Effective Date of Sections 212(a)(9)(B) and (C)(i)(I) of the Act**

(A) **Effective Date**. Only periods of unlawful presence spent in the United States after the April 1, 1997, effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Div. C of Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act of 1997, PL 104-208 (September 30, 1996))(IIRIRA), count towards unlawful presence for purposes of section 212(a)(9)(B) and (C)(i)(I) of the Act.

For purposes of section 212(a)(9)(C)(i)(I) of the Act, one (1) full year of unlawful presence must have accrued. Therefore, the earliest an individual could have been subjected to this ground of inadmissibility was April 2, 1998.

(B) **The Child Status Protection Act and Its Influence on Unlawful Presence**. On August 6, 2002, the Child Status Protection Act (CSPA) (PL 107-208, August 6, 2002) was enacted to provide relief to certain children, who "aged-out" during the processing of certain applications. The CSPA applies to derivative children of asylum and refugee applicants, children of United States citizens, children of Lawful Permanent Residents (LPRs), and derivative beneficiaries of family-based, employment-based, and diversity visas. The CSPA changes how a child's age should be calculated for purposes of eligibility for certain immigration benefits; it does not change the definition of "child" pursuant to section 101(b)(1) of the Act.

The CSPA was effective on August 6, 2002. In general, its provisions are not retroactive: Any qualified petition or application that was pending on the effective date is subject to the provisions of the CSPA. For detailed information, please consult the policy memorandum, Domestic Operations, April 30, 2008, Revised Guidance for the Child Status Protection Act (AD07-04), or AFM Chapter 21.2(e).

Calculation of Unlawful Presence, if the CSPA Is Applicable: Any derivative beneficiary child who is in a "period of stay authorized" because of a pending application or petition, does not accrue unlawful presence merely because of his or her "aging-out," if the requirements and conditions of the CSPA are met. For more information about the applicability of the CSPA, *see AFM* sections describing individual types of immigration benefits and Chapter 21.2(e).

The CSPA applies only to those benefits expressly specified by the statute. Nothing in the CSPA provides protection for nonimmigrant visa holders (such as K or V nonimmigrants), or to NACARA, HRIFA, Family Unity, Cuban Adjustment Act, and Special Immigrant Juvenile Applicants, and/or derivatives. However, there may be

limited coverage for K-2 and K-4 individuals. *See* Chapter 21.2(e). This list is not exhaustive.

(b) Determining When an Alien Accrues Unlawful Presence

(1) Aliens Present in Lawful Status or as Parolees

An alien does not accrue unlawful presence, if he or she is present in the United States under a period of stay authorized by the Secretary of Homeland Security, or if he or she has been inspected and paroled into the United States and the parole is still in effect.

An alien who is present in the United States without inspection accrues unlawful presence from the date of the unlawful arrival, unless the alien is protected from the accrual of unlawful presence as described in this *AFM* chapter. Note that an alien, who arrived at a port of entry and obtained permission to come into the United States by making a knowingly false claim to be a citizen, is present in the United States without having been inspected and admitted. *See Matter of S--,* 9 I&N Dec. 599 (BIA 1962).

(A) **Lawful Permanent Residents (LPRs).** An alien lawfully admitted for permanent residence will not accrue unlawful presence unless the alien becomes subject to an administratively final order of removal by the IJ or the BIA (which means that during the course of proceedings, the alien was found to have lost his or her LPR status), or if he or she is otherwise protected from the accrual of unlawful presence. Unlawful presence will start to accrue the day after the order becomes administratively final, and not on the date of the event that made the alien subject to removal.

(B) **Lawful Temporary Residents (Section 245A(b) of the Act and 8 CFR 245a)**. A lawful temporary resident must file an application to adjust from temporary to permanent resident status before the beginning of the 43rd month from the date he or she was granted lawful temporary resident status. *See* 8 CFR 245a.3(a)(2). However, unlike conditional permanent residents, the status of a lawful temporary resident does not automatically terminate, if the alien fails to file a timely application, and the DHS needs to advise the alien of its intent to terminate his or her Temporary Residence Status. *See* section 245A(b)(2) of the Act, and 8 CFR 245a.2(u)(2). The same procedures apply, if the alien's status is terminated for the reasons specified in section 245A(b)(2) of the Act. Lawful Temporary Resident status also terminates upon the entry of a final order of deportation, exclusion, or removal. *See* 8 CFR 245.2(u)(2).

If the DHS advises the alien of its intent to terminate lawful temporary resident status, the alien continues to be a lawful temporary resident and does not accrue unlawful presence until a notice of termination is issued. If the termination is appealed, the period of authorized stay continues through the administrative appeals process. The termination of an alien's lawful temporary resident status cannot be reviewed in removal proceedings before an immigration judge. The alien would accrue unlawful presence

time during removal proceedings or while a petition for review is pending in Federal court.

(C) **Conditional Permanent Residents under Sections 216 and 216A of the Act**

(i) Termination upon the Entry of an Administratively Final Order of Removal. As is the case with other LPRs, an alien lawfully admitted for permanent residence on a conditional basis under section 216 or 216A of the Act begins to accrue unlawful presence upon the entry of an administratively final order of removal. A conditional LPR will also accrue unlawful presence before the entry of an administratively final removal order, if USCIS terminates the alien's conditional LPR status, as described below.

(ii) Automatic Termination. Pursuant to section 216 or section 216A of the Act, an alien, who was granted conditional permanent resident status must properly file a petition to remove the conditions placed on his or her status within the 90-day period immediately preceding the second anniversary of the date on which lawful permanent resident status on a conditional basis was granted. *See* Sections 216(c)(1) and 216A(c)(1) of the Act. The petition is filed on Form I-751, Petition to Remove Conditions of Residence, or on Form I-829, Petition by Entrepreneur to Remove Conditions. *See* 8 CFR 216.4 and 8 CFR 216.6. Failure to do so results in the automatic termination of conditional resident status and the initiation of removal proceedings at the expiration of the 90-day period, unless the parties can establish good cause for failure to file the petition. *See* section 216(c)(2) and 8 CFR 216.4(a)(6); section 216A(c)(2) and 8 CFR 216.6(a)(5); section 216(c)(4) and 8 CFR 216.5. The alien begins to accrue unlawful presence as of the date of the second anniversary of the alien's lawful admission for permanent residence. *See id.* Also, failure to appear for the personal interview that may be required by USCIS in relation to the I-751 or I-829 petition results in the automatic termination of the conditional legal permanent resident status, unless the parties establish good cause for the failure to appear. *See* section 216(c)(2)(A) of the Act and 8 CFR 216.4(b)(3); section 216A(c)(2)(A) of the Act and 8 CFR 216.6(b)(3).

(iii) Late Filings of the Petition to Remove the Conditional Basis Of LPR Status by the Alien. Current regulations at 8 CFR 216.4(a)(6) and 8 CFR 216.6(a)(5) allow a conditional resident to submit a late filing to USCIS, if jurisdiction has not yet vested with the immigration judge, and if certain requirements are met. If the late filed petition is accepted and approved, no unlawful presence time will be deemed to have accrued. If jurisdiction has already vested with the immigration judge, the judge may terminate removal proceedings upon joint motion by the alien and DHS. Consequently, if a late filing is accepted and approved while the alien is in proceedings, the alien will not accrue unlawful presence time. If, however, the late filing is rejected, the alien begins to accrue unlawful presence time on the date his or her status as a conditional resident automatically terminated.

(iv) Termination on Notice. If the DHS advises the alien of its intent to terminate conditional permanent resident status, the alien continues to be a conditional permanent resident and does not accrue unlawful presence until a notice of termination is issued. The alien begins to accrue unlawful presence on the day after the notice of termination is issued, unless the alien seeks review of the termination in removal proceedings. *See* 8 CFR 216.3.

(v) Review in Removal Proceedings. If the alien seeks review of the termination in removal proceedings, DHS bears the burden of proving that the termination was proper. Thus, the alien will be deemed not to accrue unlawful presence unless the immigration judge affirms the termination. *See* 8 CFR 216.3. If the immigration judge affirms the termination, the alien will begin to accrue unlawful presence on the day after the immigration judge's removal order becomes administratively final.

(D) **Aliens Granted Cancellation of Removal or Suspension of Deportation**. Section 240A of the Act provides for two (2) different types of cancellation of removal: cancellation of removal for an alien who has been admitted for permanent residence (section 240A(a) of the Act), and cancellation of removal and adjustment of status for certain aliens who have been present in the United States for a period of not less than ten (10) years (section 240A(b) of the Act). Therefore, the effect of a grant of cancellation of removal on the accrual of unlawful presence (or of suspension of deportation under former section 244 of the Act) depends on the alien's status immediately before relief was granted, and as outlined below:

- If an alien who has already acquired LPR status becomes subject to removal but applies for and receives a grant of cancellation of removal under section 240A(a) of the Act, or a grant of suspension of deportation under former section 244 of the Act, the alien retains his or her LPR status. No period of unlawful presence will have accrued because the grant of cancellation or suspension prevents the loss of LPR status.

- If an alien who is not already an LPR obtains a grant of cancellation of removal under section 240A(b) of the Act, or a grant of suspension of deportation under former section 244 of the Act, the alien becomes an alien lawfully admitted for permanent residence as of the date of the final decision granting relief. As such, the alien will no longer accrue unlawful presence after cancellation of removal or suspension of deportation is granted. Moreover, given the special nature of these forms of relief, any unlawful presence that may have accrued before the grant of cancellation of removal or suspension of deportation will be eliminated for purposes of any future application for admission.

  Example: An alien had accrued ten (10) years of unlawful presence in the United States, and is subsequently granted cancellation of removal. The

alien is now an LPR. If, after becoming an LPR, the alien travels abroad and returns to the United States through a port of entry, none of the pre-grant unlawful presence will be considered in determining the alien's admissibility. Section 212(a)(9)(B)(i) of the Act does not apply to LPRs.

(E) **Lawful Nonimmigrants**. The period of authorized stay for a nonimmigrant may end on a specific date or may continue for "duration of status (D/S)." Under current USCIS policy, nonimmigrants begin to accrue unlawful presence as follows:

(i) Nonimmigrants Admitted until a Specific Date (Date Certain). Nonimmigrants admitted until a specific date will generally begin to accrue unlawful presence the day following the date the authorized period of admission expires, as noted on Form I-94, Arrival/Departure Record. If USCIS finds, during the adjudication of a request for immigration benefit, that the alien has violated his or her nonimmigrant status, unlawful presence will begin to accrue either the day after Form I-94 expires or the day after USCIS denies the request, whichever is earlier. If an immigration judge makes a determination of nonimmigrant status violation in exclusion, deportation or removal proceedings, unlawful presence begins to accrue the day after the immigration judge's order or the day after the Form I-94 expired, whichever is earlier. It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated. Removal proceedings have no impact on whether an individual is accruing unlawful presence. *See* 8 CFR 239.3.

Example: An individual is admitted in H-1B status until September 20, 2007, as evidenced on Form I-94, Arrival/Departure Record. On January 1, 2007, an NTA is issued and the individual is placed in removal proceedings. The individual will not start to accrue unlawful presence unless the immigration judge holds that the alien had violated his or her nonimmigrant status, or until his or her Form I-94 expires, whichever is earlier.

(ii) Nonimmigrants Admitted for Duration of Status (D/S). If USCIS finds a nonimmigrant status violation while adjudicating a request for an immigration benefit, unlawful presence will begin to accrue on the day after the request is denied. If an immigration judge makes a determination of nonimmigrant status violation in exclusion, deportation, or removal proceedings, unlawful presence begins to accrue the day after the immigration judge's order. It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated. *See* 8 CFR 239.3.

(iii) Non-controlled Nonimmigrants (e.g. Canadian B-1/B-2). Nonimmigrants, who are not issued a Form I-94, Arrival/Departure Record, are treated as nonimmigrants admitted for D/S for purposes of determining unlawful presence.

(F) Other Types of Lawful Status

(i) Aliens in Refugee Status. In general, the period of authorized stay begins on the date the alien is admitted to the United States in refugee status. If refugee status is terminated, unlawful presence will start to accrue the day after the refugee status is terminated.

If the individual is a derivative refugee, either by accompanying or by following to join the principal, the alien will commence to accrue unlawful presence as follows:

- If the derivative refugee is outside the United States: The period of stay authorized begins on the date the alien either enters as an accompanying or following-to-join refugee pursuant to section 207(c)(2) of the Act and 8 CFR 207.7.

- If the derivative refugee is inside the United States: The accrual of unlawful presence ceases when USCIS accepts the filing of a bona fide Asylee/Refugee Relative Petition (Form I-730) on the individual's behalf. USCIS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to refugees and asylees alike. Therefore, once the bona fide Form I-730 petition is filed on behalf of the individual, the individual will be protected from the accrual of unlawful presence. No period of time during which the bona fide petition is pending shall be taken into account in determining the period of unlawful presence. If the petition is subsequently denied, the individual will again begin to accrue unlawful presence, if the individual has previously accrued unlawful presence.

- Because filing a Form I-730 stops the accrual of unlawful presence, but does not cure any unlawful presence that has already accrued, an individual who departs the United States during the pendency of the petition, with or without advance parole, will trigger the 3-year or the 10-year bar. In this case and because an individual seeking refugee status has to be admissible as an immigrant pursuant to section 207 of the Act, the individual will be required to file Form I-602, Application by Refugee For Waiver of Grounds of Excludability, to overcome the bars to admissibility before the Asylee/Refugee Relative Petition can be approved. If the alien is not permitted to reenter the United States, the individual will have to seek the waiver through the U.S. consulate where the approved I-730 is processed.

(ii) Aliens Granted Asylum. The period of authorized stay begins on the date the alien files a bona fide application for asylum. *See* section 212(a)(9)(B)(iii)(II) of the Act; *see also* section (b)(2)(B) of this chapter. This includes aliens, who entered the United States illegally but who were subsequently granted asylum. If asylum status is terminated, unlawful presence starts to accrue the day after the date of termination. A grant of asylum does not eliminate any prior periods of unlawful presence.

An individual who is included in the principal's asylum application (Form I-589) as a derivative beneficiary is in a period of stay authorized as of the date the principal

applicant is in a period of stay authorized (unless he or she works without authorization or it is deemed that the application for the derivative individual is not bona fide). However, if it is determined that the asylum application is not bona fide for reasons other than the ones to be attributed to the derivative beneficiary, the individual is in a period of stay authorized until the determination is made that the application by the principal was not bona fide. Also, if the principal works without authorization, the derivative beneficiary only commences to accrue unlawful presence at the time the determination is made that the principal had worked without authorization.

Finally, a derivative beneficiary, who is physically present in the United States, but who was not included on the asylum application, is protected from the accrual of unlawful presence once the qualifying asylee files an Asylee/Refugee Relative Petition on behalf of the individual. DHS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to all applicants for asylum, including derivative beneficiaries, who obtain their status through an Asylee/Refugee Relative Petition.

(iii) Aliens Granted Temporary Protected Status (TPS) pursuant to Section 244 of the Act. If an alien's TPS application has been granted, the alien is deemed to be in lawful nonimmigrant status for the duration of the grant. *See* section 244(f) of the Act. Please *see* (b)(3)(G) of this section of this *AFM* chapter for the effect of a violation of TPS status on the accrual of unlawful presence, and for the effect of a pending TPS application on the accrual of unlawful presence.

If an alien is granted TPS, he or she is, while the grant is in effect, deemed to be in lawful nonimmigrant status for purposes of adjustment of status and change of status according to section 244(f) of the Act.

A grant of TPS does not, however, cure any unlawful presence that may have accrued before the grant of TPS. If the alien was present without inspection and admission or parole, the alien remains an alien who has not been inspected and admitted or paroled, despite the grant of TPS. *See* INS General Counsel Opinion, 91-27, March 4, 1991. Therefore, if before TPS is granted, the applicant had previously accrued unlawful presence sufficient to trigger the bars, and the applicant travels outside the United States after having obtained advance parole, his or her departure triggers the bars for purposes of an adjustment of change of status application; that is, the individual may be ineligible to adjust despite the wording of section 244(f) of the Act, and depending on the basis upon which the alien seeks adjustment. Also, if a waiver was granted for inadmissibility under section 212(a)(9)(B) or (C) of the Act for purposes of the TPS application, the alien is still inadmissible for purposes of adjustment of status because the standard of the waiver granted for TPS status is different than the one granted in relation to an immigrant benefits application (although both are filed on Form I-601, Application for Waiver of Grounds of Inadmissibility).

(G) **Aliens Present as Parolees**. Section 212(a)(9)(B)(ii) of the Act makes clear that an alien, who has been paroled, does not accrue unlawful presence as long as the parole lasts. For purposes of the accrual of unlawful presence, the specific type of parole and the reasons for the grant of parole do not matter; however, conditional parole pursuant to section 236 of the Act cannot be considered parole for purposes of section 212(a)(9)(B)(ii) of the Act. *See* section 40.9.1(a)(3)(D) of this *AFM* chapter.

An alien, who has been paroled into the United States does, however, begin to accrue unlawful presence as follows:

When a parolee remains in the United States beyond the period of parole authorization, unlawful presence begins to accrue the day following the expiration of the parole authorization.

> **Example**: The alien's parole expires January 1, 2007, and the alien does not depart. January 2, 2007 will be the alien's first day of unlawful presence.

If the parole authorization is revoked or terminated prior to its expiration date, unlawful presence begins to accrue the day after the revocation or termination.

An alien paroled for the purpose of removal proceedings will begin to accrue unlawful presence the day after the date the removal order becomes administratively final, or unless the alien is otherwise protected from the accrual of unlawful presence.

(2) **Aliens Present in Unlawful Status Who Do not Accrue Unlawful Presence by Statute for Purposes of Section 212(a)(9)(B) of the Act (Statutory Exceptions)**

As noted in section (a)(2) of this *AFM* chapter, an alien must be in the United States in an unlawful status in order to accrue unlawful presence; however, there are some situations in which unlawful presence does not accrue despite unlawful status. The alien may be protected from accruing unlawful presence by section 212(a)(9)(B) of the Act itself, or by USCIS policy. This section (b)(2) deals with individuals, who are actually in unlawful status but who, by statute, do not accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act.

The exceptions listed in this section (b)(2) apply *only* to grounds of inadmissibility listed in section 212(a)(9)(B) of the Act, and *do not* apply for purposes of inadmissibility under section 212(a)(9)(C) of the Act. There are two reasons for this conclusion: 1) The terms of sections 212(a)(9)(B)(iii) and (iv) of the Act refer *only* to specific subsections of section 212(a)(9)(B)(i) of the Act; and 2) Inadmissibility under section 212(a)(9)(C)(i)(I) of the Act rests on a more serious immigration violation than simple unlawful presence: To be inadmissible under section 212(a)(9)(C)(i)(I) of the Act, the alien must not only have accrued sufficient unlawful presence but also returned or attempted to return to

the United States without admission. Since the precise language of sections 212(a)(9)(B)(iii) and (iv) of the Act clearly make them apply only to inadmissibility under section 212(a)(9)(B) of the Act and not to inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, and because violations of section 212(a)(9)(C)(i)(I) of the Act are more culpable than mere unlawful presence, USCIS has concluded that these statutory exceptions do not apply to section 212(a)(9)(C)(i)(I) cases. *See* June 17, 1997, Office of Programs memorandum – *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)*; *see also* Section (b)(3) below for the same remark.

(A) **Minors Who Are under 18 Years of Age**. An alien whose unlawful status begins before his or her 18th birthday does not begin to accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act until the day after his or her 18th birthday pursuant to section 212(a)(9)(B)(iii)(I) of the Act.

(B) **Aliens with Pending Asylum Applications (Including Children Aging Out and Dependents of Asylum Applicants)**

(i) Principal Applicant. An alien, whose bona fide application for asylum is pending, is in an authorized period of stay and does not accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act unless the alien is employed without authorization while the application is pending. *See* section 212(a)(9)(B)(iii)(II) of the Act. It does not matter whether the application is or was filed affirmatively or defensively.

DHS has interpreted the phrase "bona fide asylum application" to mean a properly filed asylum application that has a reasonably arguable basis in fact or law, and is not frivolous. If this is the case, unlawful presence does not accrue while the application is pending unless the alien engages in unauthorized employment. DHS considers the application for asylum to be pending during any administrative or judicial review (including review in Federal court).

A denial of an asylum claim is not determinative of whether the claim was bona fide for purposes of section 212(a)(9)(B)(iii)(II) of the Act. Similarly, the abandonment of an application for asylum does not mean that the application was not bona fide. The Asylum Division within the Refugee, Asylum, and International Operations Directorate at USCIS' HQ can provide guidance regarding whether a filing of an asylum application can be deemed "bona fide" based on the specific facts of the case and should be contacted, if there are any questions as to the determination.

(ii) Dependents in General.
An individual who is included in the principal's asylum application (Form I-589) as a derivative beneficiary is in a period of stay authorized as of the date the principal applicant is in a period of stay authorized (unless he or she works without authorization or it is deemed that the application for the derivative individual is not bona fide).

However, if it is determined that the asylum application is not bona fide for reasons other than the ones to be attributed to the dependent, the individual is in a period of stay authorized, for example until the determination is made that the application was not bona fide. Also, if the principal works without authorization, the derivative beneficiary only commences to accrue unlawful presence at the time the determination is made that the principal had worked without authorization.

A dependent's asylum case is no longer considered pending if the principal asylum applicant notifies USCIS that the dependent is no longer part of the principal's application, or if USCIS determines that the dependent relationship no longer exists (for example because of divorce, or if the individual is no longer considered a "child"). In such cases, USCIS will remove the individual from the pending asylum application; the individual must file his or her own asylum application as a principal applicant within a reasonable amount of time. The individual will commence to accrue unlawful presence from the time USCIS has removed the dependent from the principal's application. Individuals, who do file a bona fide application within a reasonable period of time, will be deemed to have a pending application and they do not accrue unlawful presence from the time the new bona fide application is pending.

Finally, a derivative beneficiary, who is physically present in the United States but who was not included on the asylum application, is in a period of stay authorized at the time the qualifying asylee files an Asylee/Refugee Relative Petition on behalf of the individual. DHS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to all applicants for asylum, including derivative beneficiaries who obtain their status through an Asylee/Refugee Relative petition.

Adjudicators should keep in mind that if the principal asylum applicant's dependent is not yet 18 years old, then the dependent will be protected from accrual of unlawful presence under section 212(a)(9)(B)(iii)(I) of the Act.

(iii) Children Who Age Out and The Child Status Protection Act (CSPA). The CSPA amended section 208(b)(3)(B) of the Act to allow continued classification as a child for an unmarried son or daughter, who was under 21 years of age on the date the parent filed for asylum, provided that the son or daughter turned 21 years of age while the application remained pending. Therefore, if the requirements of the CSPA are met (the alien is present in the United States, named in the asylum application of his or her parent, and the application was pending on or after August 6, 2002) the individual may continue to be classified as a "child" and can be considered to have a pending application. Thus, unlawful presence does not accrue in such cases.

Example: Form I-589, Application for Asylum and for Withholding of Removal, was filed on February 7, 2000, listing a 20-year old derivative son in the United States. The son turned 21 on October 1, 2000. The application remained pending through August 6, 2002, and continues to be pending. For purposes of the asylum application, the son

continues to be a "child" because the application was filed prior to his 21st birthday. The son will not start to accrue unlawful presence until and unless the application is denied.

(C) **Aliens Physically Present in the United States with pending Forms I-730**
Accrual of unlawful presence stops upon the filing of a bona fide Asylee/Refugee Relative Petition (Form I-730). USCIS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to refugees and asylees alike. Therefore, once the bona fide petition is properly filed on behalf of the individual, the individual will no longer accrue unlawful presence.

If the alien was already accruing unlawful presence when the Form I-730 was filed, and the Form I-730 is subsequently denied, the individual will again begin to accrue unlawful presence on the day after the denial of the petition. If, at the time of the filing of the Form I-730, the alien was protected from the accrual of unlawful presence (for example, was in lawful status or had another application pending), but the other basis for protection expired while the Form I-730 was pending, then the alien will begin to accrue unlawful presence on the day after the denial of the Form I-730.

No period during which the bona fide Form I-730 was pending will be counted in determining the accrual of unlawful presence. Since the filing of a Form I-730 does not cure any unlawful presence that has already accrued, if the individual departs during the pendency of the petition, the individual will trigger the 3-year and the 10-year bar, if, prior to the filing of the petition, the individual has already accrued sufficient unlawful presence. Because a refugee has to be admissible as an immigrant pursuant to section 207 of the Act, the individual, upon his return to the United States, will be required to file Form I-602, Application By Refugee For Wavier of Grounds of Excludability, to overcome the bars to admissibility before Form I-730 can be granted to confer derivative refugee status. If the alien departs without advance parole, the individual will have to seek the waiver through the U.S. consulate where the approved Asylee/Refugee Relative Petition will be processed.

(D) **Beneficiary of Family Unity Protection (FUP) Granted pursuant to Section 301 of the Immigration Act of 1990; 8 CFR 236.15**. No period of time in which an alien is a beneficiary of FUP shall be taken into account in determining the period of unlawful presence in the United States, for purposes of section 212(a)(9)(B) of the Act. If the FUP application (Form I-817) is approved, the accrual of unlawful presence will be deemed to have stopped as of the date of the filing of Form I-817, Application for Family Unity Benefits, and will continue through the period the alien retains FUP protection. The grant of FUP protection does not, however, erase prior unlawful presence.

The filing of Form I-817, by itself, does not stop the accrual of unlawful presence. If the Form I-817 is denied, the individual will continue to accrue unlawful presence as if no Form I-817 had been filed.

Section 212(a)(9)(B)(iii)(III) of the Act, by its terms, applies only to Family Unity Program benefits under section 301 of the Immigration Act of 1990. Congress provided similar benefits under section 1504 of the LIFE Act Amendments of 2000. As a matter of policy, USCIS treats section 1504 FUP cases the same as section 301 FUP cases, for purposes of the accrual of unlawful presence. See *AFM* chapter 40.9.2(b)(3)(F), below.

(E) **Certain Battered Spouses, Parents, and Children**. An approved VAWA self-petitioner and his or her child(ren) can claim an exception from inadmissibility under section 212(a)(9)(B)(i) of the Act, if he or she can establish a substantial connection between the abuse suffered, the unlawful presence, and his or her departure from the United States. He or she claims this exception by submitting evidence of such substantial connection with his or her adjustment application. If the exception is granted, the individual is deemed to not be inadmissible under section 212(a)(9)(B)(i) of the Act for purposes of future immigration benefits. This exception does not apply to inadmissibility under section 212(a)(9)(C)(i) of the Act, which has its own VAWA waiver in section 212(a)(9)(C)(iii) of the Act.

(F) **Victims of Severe Form of Trafficking in Persons**. Section 212(a)(9)(B)(i) of the Act does not apply to certain victims of severe forms of trafficking. *See* section 212(a)(9)(B)(iii)(V) of the Act. Similar to the battered spouses, a victim of a severe form of trafficking in persons may claim an exception to inadmissibility under section 212(a)(9)(B)(i) of the Act, if he or she can demonstrate that the severe form of trafficking (as that term is defined in section 7102 of Title 22 U.S.C.) was at least one central reason for the alien's unlawful presence in the United States. An individual can claim the exception by submitting evidence of the central reason with Form I-914, Application for T Nonimmigrant Status, or, at the time of the adjustment, when filing Form I-485, Application to Register Permanent Residence or Adjust Status. 8 CFR 214.11; 8 CFR 245.23 If the exception is granted by USCIS, the individual will be deemed to have never accrued any unlawful presence for purposes of the current nonimmigrant benefits application or any future benefits application.

If the exception is not granted, the individual may apply for a discretionary waiver of the ground of inadmissibility. If seeking T nonimmigrant status, the alien would apply under section 212(d)(3)(A) or 212(d)(13) of the Act by filing Form I-192, Advance Permission to Enter as Nonimmigrant. See 8 CFR 212.16. If the alien is already a T nonimmigrant, and is seeking adjustment of status, the alien would file Form I-601, Application for Waiver Grounds of Inadmissibility. See 8 CFR 212.18.

(G) **Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS)("Tolling")**. Pursuant to section 212(a)(9)(B)(iv) of the Act, a nonimmigrant, who has filed a timely request for extension of nonimmigrant status (EOS) or change of nonimmigrant status (COS), is protected from accruing unlawful presence during the pendency of the application for up to 120 days (the accrual of unlawful presence is "tolled"). Section 212(a)(9)(B)(iv) of the Act is only applicable to the three-year bar of section 212(a)(9)(B)(i)(I) of the Act, and is also referred to as the

"tolling-provision." However, unlawful presence for purposes of the 3-year bar will only be tolled, if

1) the alien has been lawfully admitted or paroled into the United States, and

2) the application for EOS or COS is timely filed, and not frivolous, and

3) the alien does not engage and/or has not been engaging in unauthorized employment. *See* section 212(a)(9)(B)(iv) of the Act.

By policy, USCIS has extended the 120-day statutory tolling period to cover the entire period during which an application for EOS or COS is pending; this extension is valid for the 3-year and the 10-year bars. For a more detailed description of this extension and guidance concerning whether unlawful presence accrues after the 120-day period specified by the statute, please *see* section 3(C) below.

(3) **Aliens Present in Unlawful Status Who Do not Accrue Unlawful Presence by Virtue of USCIS Policy for Purposes of Sections 212(a)(9)(B) and (C)(i)(I) of the Act**

As noted in section (a)(2) of this *AFM* chapter, there are some circumstances in which an alien whose status is actually unlawful is, nevertheless, protected from the accrual of unlawful presence. As a matter of policy, USCIS has determined that an alien whose status is actually unlawful does not accrue unlawful presence in the situations described in this subsection. These exceptions are based on policy, unlike the statutory exceptions listed in sections 212(a)(9)(B)(iii) and (iv) of the Act that were discussed in section (b)(2) of this *AFM* chapter. It is USCIS' policy that these exceptions apply to unlawful presence accrued for purposes of sections 212(a)(9)(B) and (C)(i)(I) of the Act unless otherwise noted in this section.

(A) **Aliens with Properly Filed Pending Applications for Adjustment of Status or Registry (Sections 209, 245, and 245(i) of the Act, sections 202 of Public Law 99-603 (Cuban-Haitian Adjustment), section 202(b) of NACARA, section 902 of HRIFA, and aliens with properly filed, pending Registry applications under section 249 of the Act)**. Accrual of unlawful presence stops on the date the application is properly filed pursuant to 8 CFR 103 and the regulatory filing requirements governing the particular type of benefit sought. Note that, if the application is properly filed according to the regulatory requirements, the applicant will not accrue unlawful presence, even if it is ultimately determined that the applicant was not eligible for the benefit in the first place. The accrual of unlawful presence is tolled until the application is denied.

> **Example**: An alien, who has been unlawfully in the United States for 90 days, and who had worked without authorization during the 90 days, applies for adjustment of status based on an approved I-130, Petition for Alien Relative. The

application for adjustment of status is properly filed, that is, the application is fully executed, signed, and the applicant pays the proper fee. *See* 8 CFR 103.2(a)(7). Also, with the application package, the alien provides a copy of Form I-797, Notice of Approval for the Alien Relative Petition, and a copy of the newest Visa Bulletin, demonstrating that a visa number is immediately available in his or her preference category. *See* 8 CFR 245.2. Therefore, USCIS accepts the application and stamps it as received and properly filed as of January 1, 2007. What is not readily apparent from the initial review of the application is that the alien had previously worked without authorization, and therefore, he or she is not eligible to apply for adjustment of status pursuant to section 245(c) of the Act. However, because the application was accepted by USCIS as (technically) properly filed, the applicant is now in authorized stay and does not accrue any unlawful presence during the pendency of the properly filed application for adjustment of status.

At the time of the interview, on April 1, 2007, the applicant's adjustment of status application is denied based on section 245(c) of the Act, for having been employed without authorization. On April 2, 2007, the alien's accrual of unlawful presence resumes because he or she no longer has a pending application for adjustment of status. The alien departs the United States on May 1, 2007, after having secured an immigrant visa interview at the US Embassy/consular section in his or her home country. In assessing the alien's inadmissibility under section 212(a)(9) of the Act, the consular officer will count the alien's 90 days of unlawful presence that accrued prior to the filing of the adjustment of status application, and the 30 days of unlawful presence that accrued after the adjustment of status application was denied. However, the consular officer will not count the time period during which the adjustment of status application was pending because the individual was in a period of stay authorized and did not accrue unlawful presence during the pendency of the adjustment application. In total, the alien had accrued 120 days of unlawful presence in the United States; the alien is not inadmissible under section 212(a)(9)(B) of the Act.

Except in the case of a NACARA or HRIFA application, the application must have been filed affirmatively (with USCIS) rather than defensively (before the immigration judge as a form of relief from removal) for it to toll the accrual of unlawful presence; that is, an alien, who files an application for adjustment of status after being served with a Notice to Appear (NTA) in removal proceedings, is not protected from the accrual of unlawful presence. Accrual of unlawful presence resumes the day after the application is denied. However, if the application that was filed with USCIS is denied, and the alien has a legal basis upon which to renew the application in proceedings before an immigration judge, the protection against the accrual of unlawful presence will continue through the administrative appeal. *See* for example for adjustment of status applications under section 245 of the Act: 8 CFR 245.2(a)(5)(ii) and 8 CFR 1245.2(a)(5)(ii).

(B) **Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS)("Tolling")**. As noted in 40.9.2(b)(2)(G) of this AFM chapter, by statute, an alien does not accrue unlawful presence for up to 120 days while a non-frivolous EOS or COS application is pending, provided that the alien does not work and/or has not worked unlawfully. This is referred to as "tolling:" while the application is pending after having been properly filed, the alien will not accrue unlawful presence. The above described statutory exception applies to section 212(a)(9)(B)(i)(I) of the Act; it does not apply to section 212(a)(9)(B)(i)(II) or (C)(i)(I) of the Act.

However, according to USCIS policy, an alien does not accrue unlawful presence (the accrual of unlawful presence is tolled), and is considered in a period of stay authorized for purposes of sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act during the entire period a properly filed EOS or COS application is pending, if the EOS or COS application meets the following requirements:

- the non-frivolous request for EOS or COS was filed timely. To be considered timely, the application must have been filed with USCIS, i.e. be physically received (unless specified otherwise, such as mailing or posting date) before the previously authorized stay expired. *See* 8 CFR 103.2(a)(7); 8 CFR 214.1(c)(4); 8 CFR 248.1(b). An untimely request may be excused in USCIS' discretion pursuant to 8 CFR 214.1(c)(4) and 8 CFR 248.1(b); and
- the alien did not work without authorization before the application for EOS or COS was filed or while the application is pending; and
- the alien has not failed to maintain his or her status prior to the filing of the request for EOS or COS.

If these requirements are met, the period of authorized stay covers the 120-day tolling period described in section 212(a)(9)(B)(iv) of the Act and extends to the date a decision is issued on the request for EOS or COS.

A request for EOS or COS may be filed on Form I-539, Application to Extend/Change Nonimmigrant Status, or may be included in the filing of Form I-129, Petition for a Nonimmigrant Worker.

Please *see* Section 40.9.2(b)(2)(G) of this *AFM* chapter for a detailed description of the statutory tolling provision under section 212(a)(9)(B)(iv) of the Act, covering *only* inadmissibility under section 212(a)(9)(B)(i)(I) of the Act.

(C) **Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS) Who Depart the United States During the Pendency**. Departure from the United States while a request for EOS or COS is pending, does not subject an alien to the 3-year, 10-year, or permanent bar, if he or she departs after the expiration of Form I-94, Arrival/Departure Record unless the application was frivolous,

untimely, or the individual had worked without authorization. D/S nonimmigrants, who depart the United States while an application for COS or EOS is pending, generally do not trigger the 3-year, 10-year, or permanent bar under sections 212(a)(9)(B)(i) or 212(a)(9)(C)(i)(I) of the Act.

- Evidentiary Considerations: If the applicant subsequently applies for a nonimmigrant visa abroad, the individual has to establish to the satisfaction of the consular officer that the application was timely filed and not frivolous. The requirement that the application was timely may be established through the submission of evidence of the date the previously authorized stay expired, together with a copy of a dated filing receipt, a canceled check payable to USCIS for the EOS or COS application, or other credible evidence of a timely filing.

- Determination by a Consular Officer that the Application Was Non-Frivolous: To be considered non-frivolous, the application must have an arguable basis in law and fact, and must not have been filed for an improper purpose (such as to prolong one's stay to pursue activities inconsistent with one's status). In determining whether an EOS or COS application was non-frivolous, DOS has instructed consular posts that it is not necessary to make a determination that USCIS would have ultimately ruled in favor of the alien. *See* 9 Foreign Affairs Manual (*FAM*) 40.92 Notes, Note 5c.

(D) **Nonimmigrants - Effect of a Decision on the Request for Extension of Status (EOS) or Change of Status (COS) on Unlawful Presence**. The following information pertains to applications requesting EOS or COS, or petitions that include requests for EOS or COS.

(i) Approved Requests. If a request for EOS or COS is approved, the alien will be granted a new period of authorized stay, retroactive to the date the previous period of authorized stay expired. This applies to aliens admitted until a specific date and aliens admitted for D/S.

(ii) Denials Based on Frivolous Filings or Unauthorized Employment. If a request for EOS or COS is denied because it was frivolous or because the alien engaged in unauthorized employment, any and all time after the expiration date marked on Form I-94, Arrival/Departure Record, will be considered unlawful presence time, if the alien was admitted until a specific date. However, if the alien was admitted for D/S, unlawful presence begins to accrue on the date the request is denied.

(iii) Denials of Untimely Applications. If a request for EOS or COS is denied because it was not timely filed, unlawful presence begins to accrue on the date Form I-94 expired. If, however, the alien was admitted for D/S, unlawful presence begins to accrue the day after the request is denied.

(iv) Denials for Cause of Timely Filed, Non-Frivolous Applications for EOS or COS. If a timely filed, non-frivolous request for EOS or COS is denied for cause, unlawful presence begins to accrue the day after the request is denied.

(v) Motion to Reopen/Reconsider. The filing of a motion to reopen or reconsider does not stop the accrual of unlawful presence. *See* 8 CFR 103.5(a)(iv) (Effect of motion or subsequent application or petition). However, if the motion is successful and the benefit granted, the grant is effective retroactively. The alien will be deemed to not have accrued unlawful presence. If DHS reopens proceedings, but ultimately denies the petition or application again, the petition or application will be considered to have been pending since the initial filing date. Thus, unlawful presence will accrue as specified in paragraphs (ii), (iii) or (iv). In the case of a timely, non-frivolous application, unlawful presence will accrue from the date of the last denial of the petition or application, not from the earlier, reopened decision.

(vi) Appeal to the Administrative Appeals Office (AAO) of the Underlying Petition Upon Which an EOS or COS Is Based. If an individual applies for an EOS or COS as part of an I-129, Petition for Nonimmigrant Worker, the adjudicator has to adjudicate two requests: The petition seeking a particular classification, and the request for an EOS or COS.

The denial of an EOS or COS cannot be appealed. *See* 8 CFR 214.1(c)(5) and 248.3(g). However, the denial of the underlying petition for the status classification can, in general, be appealed. The filing of an appeal to the AAO for the denial of the underlying petition, however, has no influence on the accrual of unlawful presence. Unlawful presence starts to accrue on the day of the denial of the request for EOS or COS regardless of whether the applicant or the petitioner appeals the denial of the petition to the AAO. However, if the denial of the underlying petition is reversed on appeal, and the EOS or COS subsequently granted, the individual is not deemed to have accrued any unlawful presence between the denial of the petition and request for EOS or COS, and the subsequent grant of the EOS or COS.

(vii) Nonimmigrants - Multiple Requests for EOS Or COS ("Bridge Filings") and Its Effect on Unlawful Presence. The terms "authorized status" (authorized period of admission or lawful status) and "period of stay authorized by the Secretary of Homeland Security" are not interchangeable. They do not carry the same legal implications. *See* Section (a)(2) of this *AFM* chapter. An alien may be in a period of stay authorized by the Secretary of Homeland Security but not in an authorized status.

An alien whose authorized status expires while a timely filed request for EOS or COS is pending, is in a period of stay authorized by the Secretary of Homeland Security. The alien does not accrue unlawful presence as long as the timely filed request is pending. However, the filing of a request for EOS or COS does not put an individual into valid

and authorized nonimmigrant status, i.e. he or she is not in authorized status. Therefore, if an individual has filed an initial application for EOS or COS and subsequently files additional (untimely) requests for EOS or COS, the subsequently filed request will not stop the individual from accruing unlawful presence, if the initial request is denied.

(E) **Aliens with Pending Legalization Applications, Special Agricultural Worker (SAW) Applications, and LIFE Legalization Applications**. An alien who properly filed an application under section 245A of the Act (including an applicant for Legalization under any Legalization-related Class Settlement Agreements), section 210 of the Act, or section 1104 of the LIFE Act, is in a period of authorized stay as long as the application remains pending. Accrual of unlawful presence stops on the date the application is filed and resumes the day after the application is denied. However, if the denial is appealed, the period of authorized stay continues through the administrative appeals process. Denied applications cannot be renewed before an immigration judge. Therefore, the period of authorized stay does not continue through removal proceedings or while a petition for review is pending in Federal court.

(F) **Aliens granted Family Unity Program Benefits under section 1504 of the LIFE Act Amendments of 2000**

Section 212(a)(9)(B)(III)(iii) of the Act, by its terms, applies only to Family Unity Program (FUP) benefits under section 301 of the Immigration Act of 1990. Congress provided similar benefits under section 1504 of the LIFE Act Amendments of 2000. As a matter of policy, USCIS treats section 1504 FUP cases the same as section 301 FUP cases, for purposes of the accrual of unlawful presence.

As with section 301 FUP cases, if the Form I-817 is approved, then the alien will be deemed not to accrue unlawful presence from the Form I-817 filing date throughout the period of the FUP grant.

A grant of FUP benefits under section 1504 does not, however, erase any unlawful presence accrued before the grant of FUP benefits under section 1504 of the LIFE Act Amendments of 2000.

Also, as with section 301 FUP cases, the filing of Form I-817, by itself, does not stop the accrual of unlawful presence. If the Form I-817 is denied, the individual will continue to accrue unlawful presence as if no Form I-817 had been filed.

(G) **Aliens with Pending Applications for Temporary Protected Status (TPS) pursuant to Section 244 of the Act**. The period of authorized stay begins on the date a prima facie application for TPS is filed, provided the application is ultimately approved. If the application is approved, the period of authorized stay continues until TPS status is terminated. If the application is denied, or if prima facie eligibility is not established, unlawful presence accrues as of the date the alien's previous period of authorized stay

expired. The application for TPS can be renewed in removal proceedings pursuant to 8 CFR 244.11 and 8 CFR 1244.11, and the period of authorized stay continues through removal proceedings.

(H) **Aliens Granted Voluntary Departure pursuant to Section 240B of the Act**
Voluntary departure is a discretionary relief that allows certain favored aliens to leave the country willingly. Voluntary departure can either be granted by DHS, by the immigration judge, or the Board of Immigration Appeals (BIA). The length of the voluntary departure period that can be granted depends on the stages of proceedings the alien is in. If the alien is not in removal proceedings, DHS can grant voluntary departure for up to 120 days. *See* section 240B(a) and 8 CFR 240.25. The denial of voluntary departure at this stage, cannot be appealed; however, the denial is without prejudice to the alien for a later application of voluntary departure in removal proceedings. See 8 CFR 240.25(e).

If the alien is in removal proceedings but these proceedings are not yet completed, or if the alien's proceedings are at the conclusion, the immigration judge or the judge at the BIA, may grant voluntary departure. *See* section 240B(a) or (b) of the Act; 8 CFR 1240.26. If the IJ denies voluntary departure, the denial can be appealed to the BIA. 8 CFR 1240.26(g). The time period granted can be up to 120 days if granted prior to completion, or up to 60 days if granted at the conclusion of proceedings. See 8 CFR 1240.26(e). Under certain circumstances, the voluntary departure period can be extended, or voluntary departure reinstated. Voluntary departure is always granted in lieu of removal proceedings or a final order of removal. Therefore, if an alien timely departs according to the voluntary departure period, the alien is not subject to a final order of removal. However, if the alien fails to depart, and there was an alternate order of removal, the alternate order will be become effective upon the alien's failure to depart. *See* 8 CFR 1240.26(d).

On December 18, 2008, the Department of Justice amended the voluntary departure rule; the changes became effective on January 20, 2009 and apply prospectively only. 73 FR 76927 (December 18, 2008). The new rules clarified the relationship between voluntary departure and the filing of a motion to reopen/reconsider or petition for review. It also clarified the impact of the failure to post bond on voluntary departure and the alternate order of removal.

General Rule for the Accrual of Unlawful Presence in Connection With A Grant of Voluntary Departure: Accrual of unlawful presence stops on the date an alien is granted voluntary departure and resumes on the day after voluntary departure expires, if the alien has not departed the United States according to the terms of the grant of voluntary departure.

(i) Voluntary Departure Granted by DHS pursuant to 8 CFR 240.25 (Including Extension of Voluntary Departure). If DHS grants voluntary departure before initiation of removal

proceedings, time spent in voluntary departure does not add to an alien's unlawful presence. A grant of voluntary departure prior to the initiation of removal proceedings may not exceed 120 days. *See* section 240B(a)(2) of the Act. Pursuant to 8 CFR 240.25, voluntary departure may be extended at the discretion of the Field Office Director, except that the total period allowed, including any extensions, may not exceed the 120-day limit. Courts may not extend voluntary departure but they may reinstate voluntary departure.

(ii) Voluntary Departure Granted Pursuant to Section 240B of the Act after the Initiation of Removal Proceedings. If a person is granted voluntary departure after commencement of removal proceedings, unlawful presence ceases to accrue with the grant, and resumes after the expiration of the voluntary departure period. Voluntary departure after the initiation of removal proceedings is governed by section 240B(b) of the Act and 8 CFR 1240.26.

If the immigration judge grants voluntary departure, the alien is not subject to the 3-year bar because of the wording of section 212(a)(9)(B)(i)(I) of the Act. However, the fact that proceedings commenced does not stop the accrual of unlawful presence time for purposes of the 10-year and the permanent bar. *See* 8 CFR 239.3.

(iii) Reversal of a Denial of Voluntary Departure. If the denial of voluntary departure by the Immigration Judge is reversed on appeal by the BIA, the time from the denial to the reversal will be considered authorized stay in the United States (Remember: A denial of voluntary departure by USCIS cannot be appealed.)

(iv) Reinstatement of Voluntary Departure by the Board Of Immigration Appeals (BIA) or the Immigration Judge. An immigration judge or the BIA may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntary departure, and if reopening was granted prior to the expiration of the original period of voluntary departure. *See* 8 CFR 1240.26(h). In no event can the reinstatement of voluntary departure result in a total period of time, including any reinstatement, exceeding the 60 or the 120 days of voluntary departure stated in section 240B of the Act. If voluntary departure is reinstated by the BIA or by the immigration judge, the time from the expiration of the grant of voluntary departure to the grant of reinstatement is not considered authorized stay. However, the time of the reinstated voluntary departure to the ending period of this voluntary departure, is considered authorized stay. Reinstatement of voluntary departure is regulated at 8 CFR 1240.26(h).

(v) Effect of a Petition for Review. In a case involving a grant of voluntary departure before January 20, 2009, if a Federal court with jurisdiction to review the removal order stays the running of the voluntary departure period while the case is pending, the alien will continue to be considered to be under a grant of voluntary departure and will not accrue unlawful presence.

For any EOIR grant of voluntary departure on or after January 20, 2009, however, the filing of a petition for review terminates a grant of voluntary departure and makes the alternate removal order immediately effective. 8 CFR 1240.26(i). If the alien files a petition for review, therefore, the alien will no longer be protected from the accrual of unlawful presence based on the voluntary departure grant. If the alien remains in the United States while the petition is pending, the accrual of unlawful presence will begin the day after the petition for review is filed. This regulation, however, gives the alien 30 days after filing the petition for review in order to leave the United States voluntarily. If the alien leaves within this 30-day period, the alien will continue to be protected from the accrual of unlawful presence up to the date of the alien's actual departure.

(vi) Voluntary Departure and the Filing of A Motion to Reopen To the Board of Immigration Appeals (BIA)

A motion to reopen is a form of procedural relief that asks the BIA to change its decision in light of newly discovered evidence or a change in circumstances since the hearing. *See Dada v. Mukasey*, 128 S.Ct. 2307, 2315 (2008). In general, a motion to reopen has to be filed within 90 days. *See* 240(c)(7) of the Act. Therefore, an alien granted voluntary departure for a period of up to 60 days is either faced with the choice of departing according to the voluntary departure order, or to make use of his or her statutory right to file the motion to reopen and to await the result of the adjudication of the motion.

In 2008, the Supreme Court addressed the issue and held that to safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally and without regards to the underlying merits of the motion to reopen, a voluntary departure request before expiration of the departure period. *See Dada v. Mukasey*, 128 S.Ct. 2307, 2320 (2008). As a result, the alien has the option either to abide by the terms and receive the agreed upon benefits of voluntary departure; or, alternatively, to forego those benefits and remain in the United States to pursue an administrative motion.

Therefore, if an alien was initially granted voluntary departure by the immigration judge or the Board of Immigration Appeals before January 20, 2009, but the alien later requests withdrawal of the voluntary departure order, the alien will commence to accrue unlawful presence at the time of the administratively final order of removal unless the alien is otherwise protected from the accrual of unlawful presence (such as the grant of a stay of removal by the BIA). The motion to reopen does not toll voluntary departure. If the alien requests a withdrawal of the voluntary departure order, the alien will accrue unlawful presence as if voluntary departure had never been granted even if the request for withdrawal is made, for example, on the last day of the voluntary departure period.

The *Dada* decision does not apply, however, to any EOIR grant of voluntary departure that is made on or after January 20, 2009. Under 8 CFR 1240.26(b)(3)(iii), filing a

motion to reopen or reconsider during the voluntary departure period automatically terminates the grant of voluntary departure, and makes the alternative removal order effective immediately. Thus, for a grant of voluntary departure on or after January 20, 2009, the alien will no longer be protected from the accrual of unlawful presence beginning the day after the date the alien files a motion to reopen or to reconsider.

(I) **Aliens Granted Stay of Removal**. A stay of removal is an administrative or judicial remedy of temporary relief from removal. The grant of a stay of removal can be automatic or discretionary. *See* sections 240(b)(5) and 241(c)(2) of the Act; 8 CFR 241.6, 8 CFR 1241.6, 8 CFR 1003.6, and 8 CFR 1003.23(b)(1)(v). During a grant of stay of removal, DHS is prevented from executing any outstanding order of removal, deportation, or exclusion. Therefore, an alien granted stay of removal does not accrue unlawful presence during the period of the grant of stay of removal. A stay of removal does not erase any previously accrued unlawful presence.

If an individual is ordered removed in absentia pursuant to section 240(b)(5)(A) of the Act, and he or she challenges the order in a motion to rescind the in absentia order pursuant to section 240(b)(5)(C) of the Act, the alien's removal order will be stayed automatically until the motion is decided. *See* section 240(b)(5)(C) of the Act. The order will be stayed through a possible appeal to the Board of Immigration Appeals (BIA) or Federal court. *See Matter of Rivera-Claros*, 21 I&N Dec. 232 (BIA 1996). For purposes of section 212(a)(9)(B) and (C)(i)(I) of the Act, an individual, who filed a motion to rescind an in absentia order of removal pursuant to section 240(b)(5)(C) of the Act, will not accrue unlawful presence during the pendency of the motion, including any stages of appeal before the BIA or Federal court.

(J) **Aliens Granted Deferred Action**. A DHS field office director may, in his or her discretion, recommend deferral of (removal) action, an act of administrative choice in determining, as a matter of prosecutorial discretion, to give some cases lower enforcement priority. Deferred action is, in no way, an entitlement, and does not make the alien's status lawful. Deferred action simply recognizes that DHS has limited enforcement resources and that every attempt should be made administratively to utilize these resources in a manner which will achieve the greatest impact under the immigration laws. There is no specific authority for deferred action codified in law or regulation although certain types of benefits refer to a grant of deferred action. For more information on Deferred Action, please *see* Detention and Removal Operations Policy and Procedure Manual (DROPPM), Chapter 20.8.

Accrual of unlawful presence stops on the date an alien is granted deferred action and resumes the day after deferred action is terminated. The granting of deferred action does not eliminate any prior periods of unlawful presence.

(K) **Aliens Granted Withholding of Removal under Section 241(b)(3) of the Act or Deportation under Former Section 243 of the Act**. Accrual of unlawful presence

stops on the date that withholding is granted and continuous through the period of the grant.

(L) **Aliens Granted Withholding of Removal or Deferral of Removal under the United Nations Convention Against Torture Pursuant to 8 CFR 208.16 and 8 CFR 208.17**. Accrual of unlawful presence stops on the date that withholding or deferral is granted and continuous through the period of the grant.

(M) **Aliens Granted Deferred Enforced Departure (DED)**. The period of authorized stay begins on the date specified in the Executive Order or other Presidential directive and ends when DED is no longer in effect.

(N) **Aliens Granted Satisfactory Departure under 8 CFR 217.3**. Under 8 CFR 217.3(a), a Visa Waiver Program (VWP) alien, who obtains a grant of satisfactory departure from U.S. Immigration and Customs Enforcement, and who leaves during the satisfactory departure period, is deemed to not have violated his or her VWP admission. Thus, unlawful presence will not accrue during the satisfactory departure period, if the alien departs as required. If the alien remains in the United States after the expiration of the grant of satisfactory departure, unlawful presence will begin to accrue the day after the satisfactory departure period expires unless some other provision or policy determination protects the person from accrual of unlawful presence. *See* section (b) of this *AFM* chapter.

(4) **Effect of the Protection from the Accrual of Unlawful Presence on Previously Accrued Unlawful Presence: Protection from the Accrual of Unlawful Presence Does Not Cure Previously Accrued Unlawful Presence**

Unless stated otherwise, protection from the accrual of unlawful presence under any section of this *AFM* chapter does *not* cure any unlawful presence that the alien may have already accrued before the alien came to be protected.

> **Example**: An alien accrues 181 days of unlawful presence. He or she then applies for adjustment of status. Although the alien had accrued 181 days of unlawful presence before he or she applied for adjustment of status, the alien stops to accrue unlawful presence once the adjustment of status application is properly filed. However, the already accrued unlawful presence of 181 days continues to apply to the alien. If the alien departs after having obtained a grant of advance parole, the individual will be subject to the 3-year bar under section 212(a)(9)(B)(i)(I) of the Act.

(5) **Effect of Removal Proceedings on Unlawful Presence**

(A) **Initiation of Removal Proceedings**. The initiation of removal proceeding has no effect, neither to the alien's benefit nor to the alien's detriment, on the accrual of unlawful presence. *See* 8 CFR 239.3. If the alien is already accruing unlawful presence

when removal proceedings are initiated, the alien will continue to accrue unlawful presence unless the alien is protected from the accrual of unlawful presence (as described in these *AFM* chapters). If the alien is not accruing unlawful presence when removal proceedings begin, the alien will continue to be protected from the accrual of unlawful presence until the immigration judge determines that the individual has violated his or her status, or until Form I-94, Arrival/Departure Record expires, whichever is earlier (and regardless of whether the decision is subsequently appealed).

Example 1: An alien, who is present without inspection, is placed in proceedings. The alien was already accruing unlawful presence when placed in proceedings, and will continue to do so while in proceedings unless a provision described in this A*FM* chapter stops the accrual of unlawful presence.

Example 2: An alien, admitted as an LPR, is placed in removal proceedings because of a criminal conviction. As an LPR, the alien does not accrue unlawful presence. The alien will not begin to do so unless the alien becomes subject to a final order of removal, that is, when LPR status is terminated.

Example 3: An alien, admitted as a nonimmigrant for duration of status, is placed in removal proceedings. The alien does not accrue unlawful presence while the proceedings are pending. If the immigration judge rules in the alien's favor on the removal charge, no unlawful presence applies to the alien. If the immigration judge sustains the removal charge, unlawful presence begins to accrue the day after the immigration judge's decision becomes administratively final.

Example 4: An alien is admitted as a nonimmigrant until January 10, 2011. On March 15, 2009, DHS places the alien in removal proceedings, claiming that the alien had violated a condition of admission. On May 1, 2010, the immigration judge sustains the removal charge, and the alien appeals. The Board of Immigration Appeals affirms the decision. Once the removal order becomes administratively final, the alien will accrue unlawful presence from May 2, 2010, the day after the immigration judge's order.

Example 5: An alien is admitted as a nonimmigrant until January 10, 2011. On March 15, 2009, DHS places the alien in removal proceedings, claiming that the alien had violated a condition of admission. On May 1, 2010, the immigration judge rules in the alien's favor and dismisses the removal charge. The alien will not be deemed to have accrued any unlawful presence.

Example 6: An alien in unlawful status properly files with USCIS an adjustment of status application. USCIS denies the application and places the alien in proceedings. The alien renews the application before the Immigration Judge. Because the alien is renewing an affirmative application that had stopped the

accrual of unlawful presence, the alien does not accrue unlawful presence while the adjustment application is pending before the IJ.

Example 7: An alien whose nonimmigrant admission ended on November 6, 2008, is placed in removal proceedings. On February 6, 2009, the alien files an adjustment application with the immigration judge. The alien had never filed with USCIS. Because the application is not the "renewal" of an affirmative application, filing the application with the immigration judge does not stop the accrual of unlawful presence.

Example 8: Same facts as in Example 7, except that the alien's application is under NACARA or HRIFA. In this situation, filing the application *does* stop the accrual of unlawful presence.

Example 9: An alien is admitted as a nonimmigrant until January 10, 2011. On March 15, 2009, DHS places the alien in removal proceedings, claiming that the alien had violated a condition of admission. Removal proceedings are still pending on January 11, 2011. Regardless of the outcome of the proceedings, the alien will accrue unlawful presence the day after the I-94 expires, that is, on January 11, 2011.

The result in Example 9 is consistent with *Matter of Halabi,* 15 I&N Dec.105 (BIA 1974), where the Board of Immigration Appeals (BIA) held that the expiration of the alien's authorized period of stay rendered the alien subject to removal without the need to resolve the original charge listed in the Notice to Appear (in *Halabi*, the individual was originally charged with having violated his status). The BIA indicated that being able to charge the alien as a visa overstay from the date the alien's period of authorized stay expired, although while in removal proceedings, did not "punish" the alien for contesting the original removal charge. *See Halabi*, at 106; *see also Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471, 491 (1999) (Removal of an alien, who has remained longer than authorized, is not punishment but simply a matter of the alien's "being held to the terms under which he was admitted."); *cf. Westover v. Reno,* 202 F.3d 475 (1st Cir. 2000) (dicta), and *Halabi* at 107-08 (Roberts, Board Chair, dissenting). The alien may avoid any accrual of unlawful presence, for example, by offering to settle the removal proceeding by agreeing to leave the United States no later than the date his or her status expires in return for dismissal of the charge of having violated his or her status before that date. *See* 8 CFR 239.2(a)(4) (notice to appear may be cancelled, if alien has left the United States). Leaving at the expiration of the period of authorized stay and the resulting dismissal of removal proceedings would also avoid the risk of a ruling against the alien on the original charge of having violated his or her status before it expired.

(B) **Effect of Filing an Appeal or Petition for Review on Unlawful Presence**. As noted, the initiation of removal proceedings does not affect the accrual of unlawful presence. *See* 8 CFR 239.3. Thus, the fact that an alien or DHS files an appeal to the Board of Immigration Appeals (BIA) or seeks judicial review of a removal order or the relief granted, does *not* affect the alien's position in relation to the accrual of unlawful presence. If the Board or a Federal court vacates the removal order, however, the alien will not be deemed to have accrued unlawful presence solely on the basis of the vacated removal order. If the Board or the Federal court affirms the removal order, the alien will be deemed to have accrued unlawful presence from the date of the immigration judge's order, unless the alien was already accruing unlawful presence on that date.

(6) **Effect of an Order of Supervision pursuant to 8 CFR 241.5 on Unlawful Presence**

Unless protected by some other provision included in this *AFM* chapter, an alien present in an unlawful status continues to accrue unlawful presence despite the fact that the alien is subject to an order of supervision under 8 CFR 241.5.

(c) Relief from Inadmissibility under Section 212(a)(9)(B)(i)(I) and (II), and Section 212(a)(9)(C)(i)(I) of the Act

(1) **Waiver of the 3-Year Bar or the 10-Year Bar under Section 212(a)(9)(B)(i) of the Act**

(A) **Nonimmigrants**. If a nonimmigrant is inadmissible, the nonimmigrant may apply for advance permission to enter as a nonimmigrant despite his or her inadmissibility pursuant to section 212(d)(3) of the Act, which is granted in the discretion of the Secretary of Homeland Security. If the alien is an applicant for a nonimmigrant visa at the American consulate, the alien will have to apply for this type of temporary permission through the consulate. The application is adjudicated by the United States Customs and Border Protection (CBP), Admissibility Review Office (ARO) pursuant to section 212(d)(3)(A)(i) of the Act. If the alien is an applicant at the U.S. border for admission because he or she is not required to apply for a visa (other than visa waiver applicants), the application is filed with a CBP designated port of entry or designated Preclearance office. See section 212(d)(3)(A)(ii) and 8 CFR 212.4.

If the nonimmigrant status applicant is an applicant for T or U visa status, the applicant has to file Form I-192 with USCIS at the Vermont Service Center (VSC).

(B) **Immigrants and Adjustment of Status Applicants Who Are the Spouses, Sons, or Daughters of U.S. Citizens or LPRs, and Fiancé(e)s of U.S. Citizens**. DHS has discretion to waive an alien's inadmissibility under section 212(a)(9)(B) of the Act if the alien is applying for an immigrant visa or adjustment of status and the alien is the spouse, son, or daughter of a U.S. citizen or LPR, or the fiancé(e) of a U.S. citizen (in

relation to a K-1/K-2 visa). The alien must establish that denying the alien's admission to the United States, or removing the alien from the United States would result in extreme hardship to the alien's U.S. citizen or LPR spouse, parent, or the K visa petitioner. *See* section 212(a)(9)(B)(v) of the Act; *see* 8 CFR 212.7(a). The application is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility, with the respective fee as stated in 8 CFR 103.7(b). There is no judicial review available, if the waiver is denied but the denial can be appealed to the Administrative Appeals Office of USCIS pursuant to 8 CFR 103.

If the alien seeks a waiver in relation to an application for a K-1 or K-2 visa, approval of the waiver is conditioned on the K-1's marrying the citizen who filed the K nonimmigrant visa petition within the statutory time of three (3) months from the day of the K-1 nonimmigrant's admission. The reason for this condition is that, at the time of the issuance of the K-1 or K-2 nonimmigrant visa, the K-1 and K-2 nonimmigrants are not yet legally related to the petitioner in the manner required by section 212(a)(9)(B)(v) of the Act. If the K-1 nonimmigrant does not marry the petitioner, and the K-1 and K-2 nonimmigrants do not acquire LPR status on that basis, USCIS may ultimately deny the Form I-601.

There is no waiver available to an alien parent if only his or her U.S. citizen or LPR child experiences extreme hardship on account of the mother's or father's removal.

(C) **Asylees and Refugees Seeking Adjustment of Status**. Section 212(a)(9)(B) grounds of inadmissibility can be waived for Asylees and Refugees seeking adjustment of status pursuant to section 209(c) of the Act. Such aliens must file Form I-602, Application by Refugee For Waiver of Grounds of Excludability. Under current USCIS policy, it is within the adjudicator's discretion to determine whether the waiver can be granted without requiring the filing of Form I-602. *See AFM* chapter 41.6; October 31, 2005, Domestic Operations memorandum – *Re: Waiver under Section 209(c) of the Immigration and Nationality Act (AFM* Update 05-33*).*

Normally, waiver applications for refugees are handled overseas before a person is approved for refugee classification. *See* 8 CFR 207.3(b). However, if a ground of inadmissibility arose after the alien's approval for refugee classification, or if the ground was not known to the officer who made such approval, the waiver may be sought and adjudicated as part of the refugee adjustment process. *See AFM* Chapter 23.6 (Asylee and Refugee Adjustment).

(D) **TPS Applicants**. Section 212(a)(9)(B) of the Act may be waived for humanitarian purposes, to assure family unity, or when it would be in the public interest to grant the waiver. The waiver is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility. *See* section 244 of the Act; 8 CFR 244.3.

Granting a waiver to a TPS applicant for purposes of the TPS application does not waive any grounds of inadmissibility in connection with a subsequent application for adjustment of status, although both are filed on Form I-601. This is because the standard for adjustment of status applicants to have a ground of inadmissibility waived is generally an "extreme hardship"- standard for section 212(a)(9)(B) of the Act (3-year and 10-year bars), and not the lesser standard for TPS, i.e. the standard that the waiver may be granted for "humanitarian purposes, to assure family unity, or public interest."

Therefore, if an adjustment of status applicant, who was previously granted TPS status, presents an approved Form I-601 to the adjudicator, the adjudicator should not accept this approved Form I-601 as evidence that the alien is not inadmissible under section 212(a)(9)(B) of the Act for purposes of the adjustment of status application. Rather, the adjudicator should direct the applicant to file a new Form I-601 to overcome the specific grounds of inadmissibility for adjustment of status purposes.

(E) **Legalization under Section 245A of the Act and Any Legalization-related Class Settlement Agreements, and Legalization Applicants pursuant to 8 CFR 245a.2(k) and 8 CFR 245a.18**. The waiver can be granted for humanitarian purposes, to ensure family unity, or when the granting of such a waiver is otherwise in the public interest. The waiver is filed on Form I-690, Application for Waiver of Grounds of Inadmissibility pursuant to Section 245A or 210 of the Immigration and Naturalization Act.

(2) **Waiver of the Permanent Bar under Section 212(a)(9)(C)(i)(I) of the Act**
Generally, there is no "waiver" of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. Rather, an alien who is inadmissible under section 212(a)(9)(C)(i) of the Act must, generally, obtain consent to reapply for admission under section 212(a)(9)(C)(ii) of the Act. *See AFM* chapter 43 concerning Consent to Reapply, which is sought by filing Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal.

As stated by the Board of Immigration Appeals (BIA) in *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006), the consent to reapply regulation at 8 CFR 212.2 predates the enactment of section 212(a)(9)(C) of the Act and the related consent to reapply provision in section 212(a)(9)(A)(iii) of the Act. Thus, although the *filing procedures* in 8 CFR 212.2 are still in effect, the substantive requirements of the provisions in section 212(a)(9) of the Act govern during the adjudication of Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation and Removal; a USCIS adjudicator must consider the specific requirements of section 212(a)(9)(C)(ii) of the Act when adjudicating Form I-212. A Form I-212 cannot be approved for an alien who is inadmissible under section 212(a)(9)(C)(i) of the Act unless the alien has been abroad for at least 10 years. *Matter of Torres-Garcia, supra.* This rule applies in the 9th Circuit as well as in other circuits. *Gonzales v. Department of Homeland Security,* 508 F.3d 1227 (9th Cir. 2007).

There are, however, some waivers that are also available to certain categories of aliens, who are inadmissible under section 212(a)(9)(C)(i)(I) of the Act. If an alien is eligible for one of these waivers, and the waiver is granted, it is not necessary for the alien to obtain approval of a Form I-212.

(A) **HRIFA and NACARA Applicants**. A waiver can be granted at the discretion of USCIS. The waiver is sought by filing Form I-601, Application for Waiver of Grounds of Inadmissibility. *See* 8 CFR 245.13(c)(2) and 8 CFR 245.15(e)(3). However, the standard that applies to the adjudication is the same standard as if the alien had filed Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal. *See* February 14, 2001 Office of Field Operations Memorandum, *Changes to Section 202 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), and the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), based Upon the Provisions of and Amendments to the Legal Immigration Family Equity Act (LIFE).*

(B) **Legalization, SAW, LIFE Act Legalization, and Legalization Class Settlement Agreement Applicants**. A waiver can be granted to such an applicant, if the applicant establishes that a waiver should be granted based on humanitarian reasons, to ensure family unity, or because granting the waiver would be in the public interest. The waiver is filed on Form I-690, Application for Waiver of Grounds of Excludability under Section 245A or 210 of the Act. *See* 8 CFR 210.3(e), 8 CFR 245a.2(k), and 8 CFR 245a.18(c).

(C) **TPS Applicants**. TPS applicants may obtain waivers for certain grounds of inadmissibility, including inadmissibility under section 212(a)(9)(C) of the Act. *See* section 244(c)(2) of the Act. The permanent bar may be waived for humanitarian purposes, to assure family unity, or when the granting of the waiver is in the public interest. *See* 8 CFR 244.3. The waiver is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility. *See id.*

Granting a waiver to an applicant for purposes of the TPS application does not waive any grounds of inadmissibility in connection with a subsequent application for adjustment of status, although both are filed on Form I-601. This is because the standard for adjustment of status applicants to have waived inadmissibility is different from the one used for TPS applicants. In order to overcome the permanent bar to admissibility under section 212(a)(9)(C)(i)(I) of the Act, an applicant for an immigrant visa has to file Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, rather than Form I-601, and no earlier than ten (10) years after the alien's last departure. *See* section 212(a)(9)(C)(ii) of the Act.

Therefore, if an adjustment of status applicant, who was previously granted TPS status, presents an approved Form I-601 to the adjudicator, the adjudicator should not accept this approved Form I-601 as evidence that the person is not inadmissible under section 212(a)(9)(C)(i)(I) of the Act for purposes of the adjustment of status application. Any

Form I-212 that is filed by a TPS applicant would be adjudicated according to same principles that apply generally to aliens who are inadmissible under section 212(a)(9)(C)(i)(I) of the Act, including the requirement that the alien may not obtain consent to reapply under section 212(a)(9)(C)(ii) unless the alien satisfies the 10-year absence requirement in the statute.

(D) **Certain Battered Spouses, Parents, and Children**. An approved VAWA self-petitioner and his or her child(ren) can apply for a waiver from inadmissibility under section 212(a)(9)(C)(i) of the Act, if he or she can establish a "connection" between the abuse suffered, the unlawful presence and departure, or his or her removal, and the alien's subsequent unlawful entry/entries or attempted reentry/reentries. *See* section 212(a)(9)(C)(iii) of the Act. The waiver is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility, with fee. If the waiver is granted, the ground of inadmissibility and any relating unlawful presence is deemed to be erased for purposes of any future immigration benefits applications.

(E) **Asylee and Refugee Adjustment Applicants under Section 209(c) of the Act.** Asylee and Refugee applicants for adjustment of status may obtain a waiver of inadmissibility in lieu of consent to reapply. The waiver is filed on Form I-602, Application by Refugee for Waiver of Grounds of Excludability. *See* 8 CFR 209.1 and 8 CFR 209.2(b); see also AFM chapter 41.6. Under current USCIS policy, it is within the adjudicator's discretion to determine whether the waiver can be granted without requiring the filing of Form I-602. See *AFM* chapter 41.6; October 31, 2005, Domestic Operations memorandum – *Re: Waiver under Section 209(c) of the Immigration and Nationality Act (AFM* Update 05-33*).*

Normally, waiver applications for refugees are handled overseas before a person is approved for refugee classification. *See* 8 CFR 207.3. However, if a ground of inadmissibility arose after the alien's approval for refugee classification, or if the ground was not known to the officer who made such approval, the waiver may be sought and adjudicated as part of the refugee adjustment process. *See AFM* chapter 23.6 (Asylee and Refugee Adjustment).

Note that the 10-year waiting period normally imposed on applicants for consent to reapply under this ground of inadmissibility (*see* section 212(a)(9)(C)(ii) of the Act) does not apply to refugee and asylee adjustment applicants.

(F) **Nonimmigrants.** An alien who is inadmissible under section 212(a)(9)(C)(i)(I) may, as a matter of discretion, be admitted as a nonimmigrant under section 212(d)(3) of the Act. The alien may make the application when applying for the nonimmigrant visa with the Department of State or, if eligible, file Form I-192 to seek this benefit. Obtaining relief under section 212(d)(3) does not relieve the alien of the need to obtain consent to reapply under section 212(a)(9)(C)(ii) of the Act if the alien seeks to acquire permanent residence.

AD 08-03 [Date signed]	Chapter 40.9.2	This memorandum eliminates chapter 30.1(d) of the *Adjudicator's Field Manual* (*AFM*), and redesignates the section as chapter 40.9.2

4. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

5. Contact Information

Operational questions regarding this memorandum may be directed to Roselyn Brown-Frei, Office of Policy and Strategy. Inquiries should be vetted through appropriate supervisory channels.

Distribution List: Regional Office Directors
District Office Directors (Including Overseas District Office Directors)
Service Center Directors
Asylum Office Directors
Field Office Directors

Exhibit D

Subject: **Section 212(a)(9)(B) Relating to Unlawful Presence**

Date: September 19, 1997

To: All Regional Directors
All District Directors (Including Foreign)
All Officers in Charge (Including Foreign)
All Port Directors
All Service Center Directors
All Training Academics (Glynco and Artersia)
All Regional Counsels
All District Counsels
All Asylum Directors

From: Office of Programs

This memorandum addresses section 212(a)(9)(B) of the Immigration and Nationality Act (Act), as amended by section 301(b) of the Illegal Immigration and Immigrant Responsibility Act (IIRAIRA). This memorandum modifies the guidance provided in the Service's interim memoranda (96 Act #043, dated June 17, 1997; 96 Act #026 dated March 29, 1997). The modified guidance covers the following issues: (1) whether an alien granted voluntary departure is considered to be in a stay authorized by the Attorney General; (2) what constitutes an authorized period of stay for nonimmigrants; and (3) whether time spent in proceedings counts toward calculating the alien's period(s) of unlawful presence in the United States. This memorandum also provides guidance on unlawful presence with respect to alien spouses and children granted conditional permanent residence under section 216 of the Act, and alien entrepreneurs and their spouses and children granted conditional permanent residence under section 216A of the Act.

Voluntary Departure. The Service's March 29 memorandum stated that "the grant of voluntary departure by the Service or an immigration judge will not stop the running of time 'unlawful presence'." The Service's June 17 memorandum further stated that aliens granted voluntary departure prior to, during, or following proceedings are not considered to be in the United States in a period of stay authorized by the Attorney General. The Service has reversed this interpretation of unlawful presence with respect to voluntary departure. Under the revised interpretations, voluntary departure is considered a period of stay authorized by the Attorney General, regardless of whether it is granted by the Service prior to the commencement of proceedings, by an immigration judge at the end of proceedings, or by the Board of Immigration Appeals after an appeal. If the immigration judge grants the alien voluntary departure with an alternate order of removal, and the alien fails to depart by the date specified, unlawful presence accrues as of the date the privilege of voluntary departure expires[1] and the order of removal takes effect.

Authorized Period of Stay for Nonimmigrants. The Service's March 29, 1997, memorandum stated that time unlawfully present was interpreted "to include any time spent in the United States by aliens after they have violated the terms and conditions of any form of nonimmigrant status, because time spent in violation of status in not authorized." The March 29 memorandum stated that unlawful presence is also triggered by the commission of a criminal offense that renders an alien inadmissible or removable. The Service has modified this position on the interpretation of "unlawful presence" for nonimmigrants, for purposes of applying Section 212(a)(9) of the Act. The discussion below interprets "unlawful presence" only for purposes of that paragraph of the Act. It must be emphasized that an alien may still be considered unlawfully present or in violation under other provisions of the Act (e.g. for purposes of initiating a removal proceeding) even though he or she in not deemed unlawfully present under the technical requirement of Section 212(a)(9)(B)(ii).

Under the modified interpretation, unlawful presence with respect to a nonimmigrant includes only periods of stay in the United States beyond the date noted on Form I-94, Arrival/Departure

Record. Unlawful presence does not begin to run from the date of a status violation (including unauthorized employment). Unlawful presence for a nonimmigrant may begin to accrue before the expiration date noted on the I-94, however, in two circumstances: (1) when an immigration judge makes a determination of a status violation in exclusion, deportation or removal proceedings, or (2) when the Service makes such a determination during the course of adjudicating a benefit application. In cases where the immigration judge finds there was a status violation, unlawful presence begins to accrue as of the date of the order of the immigration judge, whether or not the decision is appealed. (If the judge grants voluntary departure, however, the voluntary departure period is not considered unlawful presence). See the discussion below on Treatment of Time Spent While in Proceedings, Nonimmigrants. A Service determination of status violation may arise for example, during the adjudication of an application for extension of nonimmigrant stay or reinstatement of bona fide nonimmigrant status pursuant to 8 CFR 214; change of nonimmigrant classification pursuant to 8 CFR 248; employment authorization for certain nonimmigrants who are maintaining such status pursuant to 8 CFR 274a.12(c); or adjustment of status pursuant to 8 CFR 245. In the case of a Service determination of a nonimmigrant status violation, unlawful presence will begin as of the date of the decision denying the immigration benefit, whether or not appealed.

Moreover, the mere commission or conviction of a criminal offense does not trigger unlawful presence for a nonimmgrant who has not remained beyond the period of stay authorized on Form I-94. An immigration judge must have found the alien removable during the course of proceedings based on such an offense for the alien to be considered unlawfully present. In such a case, unless the immigration judge grants voluntary departure, unlawful presence will begin to accrue as of the date of the order of the immigration judge, whether or not the decision is appealed.

Treatment of Time Spent While in Proceedings. Time spent as an alien in proceedings before an immigration judge or higher appellate authority is not a period of stay authorized by the Attorney General. The following paragraphs provided further details on how this principle is to be applied.

Entrants Without Inspection: In the case of EWIs, unlawful presence begins to accrue as of the date the alien entered the United States without admission or parole. Unlawful presence continues to accrue while such an alien is in proceedings.

Nonimmigrants: When a nonimmigrant bearing a date-certain Form I-94 remains in the United States beyond the date noted on that form, unlawful presence begins to accrue as of the date the I-94 expired. A nonimmigrant bearing a date-certain From I-94 who is placed in removal proceedings will not begin to accrue time unlawfully present until the date noted on Form I-94 has been reached or the immigration judge orders the alien to be removed, whichever is earlier.

Parolees: When a parolee remains in the United States beyond the period of parole authorized by the Attorney General, unlawful presence begins to accrue as of the date the parole authorization expired. If, however, the parole authorization was revoked or terminated prior to the date it was due to expire, unlawful presence begins to accrue as of the date of revocation or termination. An alien paroled for the purpose of removal proceedings will not accrue time unlawfully present until the immigration judge orders the alien to be removed (whether or not the decision is appealed).

The Alien Successfully Contests the Ground of Inadmissibility or Removability: When an alien successfully contests the charges of inadmissibility or removability brought by the Service in a proceeding, the alien will be deemed not to have accrued any periods of unlawfully presence in the United States during the pendency of the proceeding. If the admission period expired during the course of proceedings, unlawful presence begins to accrue as of the date of the order.

The Service Contests the Relief Granted to the Alien by the Immigration Judge: When the immigration judge finds the alien inadmissible under section 212 of the Act or removable under section 237 of the Act, but grants the alien a form of relief that has been contested by the Service, for example, cancellation of removal, the period of unlawful presence ceases to accrue, as of the date the relief is granted by the immigration judge. If, however, the Service prevails on appeal, unlawful presence begins to accrue once again, as of the date the decision on appeal was made in favor of the Service.

Conditional Permanent Residents. An alien granted status as a conditional permanent resident under section 216 or 216A of the Act who does not timely file a petition (Form I-751 for spouses and children of U.S. citizens and lawful permanent residents, and Form I-829 for alien entrepreneurs and their spouses and children) to remove the conditions placed on that status is unlawfully present in the United States. Failure to make a timely filing results in the automatic termination of the alien's status. 8 CFR Section 216.4(a)(6) and 8 CFR Section 216.6(a)(5). Therefore, an alien who does not properly file Form I-751 or Form I-829 prior to the expiration of conditional permanent resident status has remained in the United States for longer than the period authorized by the Attorney General. Unlawful presence therefore begins to accrue as of the date the conditional status as a lawful permanent resident expires.

There are provisions in the regulations that allow the Service to accept a late Form I-751 or I-829 before jurisdiction vests with the immigration judge, if the alien can establish that failure to make a timely filings was for good cause. Alien entrepreneurs and their dependents who make a late filing must also establish there were extenuating circumstances. In these cases, the Service can approve the petition, restore the alien's status, and cancel any outstanding notice to appear. When jurisdiction vests with the immigration judge, the immigration judge may terminate the matter upon joint motion by the alien and the Service. Id. Therefore, when a late filing is accepted by the Service or the immigration judge and the alien's status has been restored, the alien will not be considered to have accrued any periods of unlawful presence in the United States. When the late filing is not accepted, however, the period of unlawful presence begins to accrue as of the date the alien's status as a conditional permanent resident expired.

In contrast, when the Service seeks to revoke an alien's conditional status as a lawful permanent resident during the 2-year period for cause, the alien continues to enjoy all the rights and privileges of a lawful permanent resident until such time as that status is formally terminated by the Service. See 8 CFR Section 216.3(a). In such cases, unlawful presence will begin to accrue as of the date the Service actually terminates the alien's status as a lawful permanent resident.

If there are any additional questions, contact Joanna London, Assistant General Counsel, Office of the General Counsel, 202/514-2895, or Sophia Cox, Adjudication Officer, Headquarters Benefits Division, at 202/514-5014.

Paul W. Virtue
Acting Executive Associate
Commissioner

Footnote:

1. Section 240B(a)(2) of the Act limits to 120 days the period of voluntary departure that may be granted to an alien prior to the completion of proceedings. Section 240B(b)(2) of the Act limits to 60 days the period of voluntary departure that may be granted to an alien by an immigration judge at the conclusion of proceedings. There are significant penalties imposed on aliens who fail to depart the United States voluntarily by the date specified. Section 240B(d) provides that an alien who fails to comply with an order permitting voluntary departure: (1) shall be subject to a civil monetary penalty of no less than $1,000 but not more than $5,000;and
2. shall be ineligible for any further grant of voluntary departure or relief under sections 240A, 245, 248 and 249 for 10 years.

Exhibit E

U.S. Citizenship and Immigration Services

USCIS Issues Revised Final Guidance on Unlawful Presence for Students and Exchange Visitors

Guidance Updated After Public Comment Period

WASHINGTON— U.S. Citizenship and Immigration Services (USCIS) has published a revised final policy memorandum (PDF, 129 KB) related to unlawful presence after considering feedback received during a 30-day public comment period that ended June 11, 2018. Under the revised final policy memorandum, effective Aug. 9, 2018, F and M nonimmigrants who fall out of status and timely file for reinstatement of that status will have their accrual of unlawful presence suspended while their application is pending.

On May 10, 2018, USCIS posted a policy memorandum changing the way the agency calculates unlawful presence for those who were in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status. The revised final memorandum published today supersedes that memorandum and describes the rules for counting unlawful presence for F and M nonimmigrants with timely-filed or approved reinstatement applications, as well as for J nonimmigrants who were reinstated by the Department of State.

“As a result of public engagement and stakeholder feedback, USCIS has adjusted the unlawful presence policy to address a concern raised in the public’s comments, ultimately improving how we implement the unlawful presence ground of inadmissibility as a whole and reducing the number of overstays in these visa categories,” said Director L. Francis Cissna. “USCIS remains dedicated to protecting the integrity of our nation’s immigration system and ensuring the faithful execution of our laws. People who overstay or violate the terms of their visas should not remain in the United States. Foreign students who are no longer properly enrolled in school are violating the terms of their student visa and should be held accountable.”

On Aug. 7, the Department of Homeland Security announced the release of the FY 2017 Entry/Exit Overstay Report. The estimated total overstay rates were lower in FY 2017 for F and J nonimmigrants, but the F, M, and J categories continue to have significantly higher overstay rates than other nonimmigrant visa categories, supporting the need to address the calculation of unlawful presence for this population.

For purposes of counting unlawful presence, a timely reinstatement application for F or M status is one where the student has not been out of status for more than five months at the time of filing. Under the revised final policy memorandum, the accrual of unlawful presence is suspended when the F or M nonimmigrant files a reinstatement application within the five month window and while the application is pending with USCIS.

If the reinstatement application is denied, the accrual of unlawful presence resumes on the day after the denial. It is incumbent on the nonimmigrant to voluntarily leave the United States to avoid accruing more unlawful presence that could result in later inadmissibility under section 212(a)(9) of the Immigration and Nationality Act. Whether or not the application for reinstatement is timely-filed, an F, J, or M nonimmigrant whose application for reinstatement is ultimately approved will generally not accrue unlawful presence while out of status.

The Department of State administers the J-1 exchange visitor program, to include reinstatement requests. If the Department of State approves the reinstatement application of a J nonimmigrant, the individual will generally not accrue unlawful presence from the time the J nonimmigrant fell out of status from the time he or she was reinstated.

In addition, the revised final policy memorandum corrects references to the Board of Immigration Appeals issuing orders of removal in the first instance.

USCIS will host a national stakeholder engagement regarding this policy memorandum on Aug. 23. Submit your email address to the USCIS Public Engagement subscription service in order to receive the invitation for this stakeholder engagement. Additional information on the policy memorandum is also available on the Unlawful Presence and Bars to Admissibility page.

For more information on USCIS and its programs, please visit uscis.gov or follow us on Twitter (@uscis), Instagram (/uscis), YouTube (/uscis), and Facebook(/uscis).

Last Reviewed/Updated: 08/09/2018